84-1545

No.

Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY,
STATE OF MONTANA, AND TAMARA L. BULEY,
Appellees

ON APPEAL FROM THE SUPREME COURT OF MONTANA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Miller-Wohl Company, Inc., the Appellant, appeals from the final judgment of the Supreme Court of Montana, dated December 28, 1984, holding that the Montana Maternity Leave Act, MCA 39-7-201, et seq., is not violative of or pre-empted by the Fourteenth Amendment, Equal Protection Clause, of the Constitution of the United States, or Titles VII and XI of the U.S. Civil Rights Act of 1964, as amended.

QUESTIONS PRESENTED

Whether the Montana Maternity Leave Act, a preferential treatment law, is violative of and preempted by Titles VII and XI of the U.S. Civil Rights Act of 1964, as amended, an equal treatment law, and/or repugnant to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF MONTANA

The parties to the proceedings in the Supreme Court of Montana are those set forth in the caption; namely, The Miller-Wohl Company, Inc., and the Commissioner of Labor and Industry of the State of Montana and Tamara L. Buley.

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OPINIONS BELOW

The opinion of the Supreme Court of Montana, which appears in the appendix hereto, p. 1b, is reported at 692 P.2d 1243.

The decision of the District Court of the Eighth Judicial District of the State of Montana is not reported. It is reprinted in the appendix hereto, p. 1c.

The findings of fact, conclusion of law, and order of the Commissioner of Labor and Industry of the State of Montana are not reported. They are reprinted in the appendix hereto, p. 1d.

JURISDICTION

The judgment of the Supreme Court of Montana, reversing the lower court (the District Court) and reinstating the Commissioner's order, was entered on December 28, 1984. See p. 1b, *infra*.

The notice of appeal to this Court was duly filed in the Supreme Court of Montana on January 28, 1985. See p. 1a, *infra*.

This appeal is being docketed in this Court within 90 days from the date of judgment by the Supreme Court of Montana. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 701(k) of Title VII, U.S. Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(k):

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Section 703(a) of Title VII, 42 U.S.C. § 2000e-2:

(a) It shall be unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 708 of Title VII, 42 U.S.C. § 2000e-7:

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law

which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Section 1104 of Title XI, U.S. Civil Rights Act of 1964, 42 U.S.C. § 2000h-4:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provisions thereof.

Chapter 7, Title 39, Revised Codes of Montana, MCA Sections 39-7-201 through 209 (The Montana Maternity Leave Act — MMLA):[1]

39-7-201. *Definitions.* (1) "Commissioner" means the commissioner of labor and industry. (2) "Employer" means any public or private employer.

39-7-203. *Unlawful acts of employers.* It shall be unlawful for an employer or his agent to: 1) terminate a woman's employment because of her pregnancy; 2) refuse to grant the employee a reasonable leave of absence for such pregnancy; 3) deny to the employee who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer; provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; 4) retaliate against any employee who files a complaint with the commissioner under the provisions of

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[1] Effective July 1, 1983, the Maternity Leave Act was recodified at MCA 49-2-310 and 311.

this part; or 5) require that an employee take a mandatory maternity leave for an unreasonable length of time.

39-7-204. *Reinstatement to job following pregnancy-related leave of absence.* Upon signifying her intent to return at the end of her leave of absence, such employees shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

39-7-205. *Complaints of Violations.* (1) A person claiming to be aggrieved by a violation of 39-7-203 or 39-7-204 may make, sign, and file a verified complaint with the commissioner, which shall state the circumstances of the violation and the particulars thereof and shall contain such other information as may be required by the commissioner. (2) In addition, the commissioner whenever he has reason to believe that section 39-7-203 or 39-7-204 has been or is being violated, may issue a complaint.

39-7-206. *Investigative powers of commissioner.* (1) The Commissioner or his authorized representatives may enter and inspect such places, question such employees, and investigate such facts, conditions, or matters as they consider appropriate, to determine whether any person has violated any provision of this act or any regulation issued hereunder or which may aid in the enforcement of the provisions of this act. (2) The commissioner or his authorized representatives may administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses, and the production of papers, books, accounts, records, payrolls, documents, and testimony, and take depositions and affidavits in any proceeding before the commissioner.

39-7-207. *Findings of fact and decision on complaint.* (1) Within 60 days of the receipt of a complaint, the commissioner shall state his findings of fact and decision.

(2) If, upon all the evidence, the commissioner finds that a respondent has engaged in a violation of 39-7-203 or 39-7-204, he shall state his findings of fact and shall order the respondent to reinstate the complainant if she so desires and to pay to the complainant the damages resulting from the violation. (3) If, upon all the evidence, the commissioner finds that the respondent has not engaged in a violation of 39-7-203 or 39-7-204, he shall state his findings of fact and shall dismiss the complaint.

39-7-208. *Individual action.* Nothing in this act shall preclude an individual from prosecuting a private action in the district court alleging violation of the provisions of this act or any other act.

STATEMENT OF THE CASE AND RAISING THE FEDERAL QUESTIONS

The Appellant owns and operates a chain of retail ladies' apparel stores throughout the United States, several of which are in Montana. Appellant has operated with a set of written employment policies and practices, entitled "Employees Guide," which sets forth the employment standards uniformly used by it throughout all of its stores in the United States, including Montana. The Guide sets forth the policy providing for equal employment opportunities and prohibiting discrimination because of race, color, religion, sex, national origin, or age. The Guide also sets forth, and Appellant's practices have uniformly been applied, that no employee, male or female, is entitled to sick leave or leaves of absence until they have been employed for at least one (1) year. There have been no exceptions to this uniform policy for disabilities, illnesses, pregnancies or other reasons for leaves, for any employees — male or female.

On August 1, 1979, Appellee Tamara Buley (hereinafter "Buley") was hired as a part-time sales clerk in the Appellant's Great Falls, Montana, store. Within a matter of days, Buley missed work, reported late or left early, and did not perform the necessary duties and functions of her

job while she was at work. As a result of her unsatisfactory performance, Buley was discharged on August 27, 1979. At the time, Buley was pregnant and had so advised Appellant's store manager.

On January 9, 1980, Buley filed a Complaint with the Montana Human Rights Commission (MHRC) alleging that her termination from employment was due to her pregnancy and constituted sex discrimination under the Montana Human Rights Act (MHRA), MCA § 49-2-303. At the same time, Buley filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), also alleging that her termination was due to pregnancy and sex and was in violation of Title VII. The MHRC is a deferral agency under Title VII and recognized by the EEOC.

The MHRC investigated the case and on June 10, 1980, it issued a Reasonable Cause Finding. However, in doing so, the MHRC specifically found that there was no violation of the MHRA nor Title VII, but noted that a violation of the Montana Maternity Leave Act (MMLA) may have resulted. This reference to the MMLA apparently led to Buley's filing her Complaint on August 6, 1980 with the Appellee Commissioner of Labor and Industry (hereinafter "Commissioner") under the MMLA.

Subsequently, the EEOC dismissed Buley's charge of discrimination. Neither the MHRC, the EEOC, nor Buley initiated any further administrative action or court action regarding Buley's alleged claim of sex discrimination.

When Appellant was served with a copy of the Commissioner's Notice of Hearing and Buley's Complaint, it filed a Complaint for injunctive relief and declaratory judgment in the U.S. District Court for the District of Montana, setting forth that the MMLA was in conflict with and, therefore, in violation of and preempted by Titles VII and XI of the U.S. Civil Rights Act (as amended), that the MMLA was a state protective law, and that the MMLA violated the Fourteenth Amendment of the U.S. Constitution.

Pending hearing for injunctive relief, the Federal District Court issued a restraining order. Subsequently, the restraining order was dissolved and the Commissioner proceeded with its hearing on Buley's Complaint. Concurrently, the Federal District Court entertained motions, briefs and arguments regarding the question of jurisdiction and the substantive issue.

On October 1, 1980, the Commissioner held a hearing and on October 3, 1980, issued his findings of fact, conclusions of law, and order. At the earliest stage of this administrative proceeding, the Appellant raised the claim that the MMLA was violative of and preempted and superseded by Titles VII and XI of the U.S. Civil Rights Act of 1964, as amended, and that it was repugnant to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Commissioner's Finding of Fact and Conclusions of Law, 1d, *infra*. With regard to Appellant's claim of unconstitutionality under the Equal Protection clause, the commissioner set forth that the Montana Maternity Leave Act was constitutional because "the classification itself has a rational basis, a nondiscriminatory intent, and bears a close relationship to important governmental objectives." *Id.*, p. 21d, *infra*. As to the preemption claim, the Commissioner found that Congress did not intend to preempt all state protective legislation by enactment of Titles VII and XI. In concluding that Appellant had violated the MMLA by dismissing Buley, the Commissioner ruled that Buley was entitled to backpay and penalties.

On October 31, 1980, Appellant filed a Petition for Judicial Review of the Commissioner's Decision/Order with the District Court of the 8th Judicial District of the State of Montana (hereinafter "District Court"). In this appeal, the preemption and unconstitutional claims were again raised by Appellant.

Pending the Federal Court actions[2] and then after holding hearings on motions and receiving briefs, on February 4, 1984, the District Court entered its Order in favor of Appellant. The District Court reversed the Commissioner and held that the MMLA was discriminatory, was a denial of equal protection of the law, was a protective and preferential statute, and was preempted by Titles VII and XI. Decision of the District Court, p. 1c, *infra*.

On March 9 and 22, 1984, Notices of Appeal were filed by Buley and the Commissioner, respectively, with the Supreme Court of Montana. After receiving briefs, including briefs from at least 6 Amici Curiae, and hearing argument, the Supreme Court reversed the District Court and found the MMLA valid.

In the appeal to the Supreme Court of Montana by the Appellees, the issues presented, briefed, and argued dealt with the preemption and equal protection questions. Opinion of the Supreme Court of Montana, p. 2b, *infra*. The Court concluded that the Montana Maternity Leave Act was not preempted by Title VII and that it was consistent with the federal laws. *Id.*, p. 25b, *infra*. Although referring to the issue of constitutionality, the Court did not address it. It must be concluded that a finding of the constitutionality of the MMLA is subsumed in its judgment and its reversal of the lower court's decision.

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[2] Although finding that it had jurisdiction (Memorandum Decision dated October 2, 1980), the Federal District Court did not issue a decision on the preemption and constitutional issues until June 1981. At that time, the Federal District Court ruled against the Appellant. 515 F.Supp. 1264 (D.Mont., 1981). Appellant appealed, raising the same issues, to the Ninth Circuit Court of Appeals. The Ninth Circuit determined none of the issues. Instead, the Court of Appeals ruled that Appellant had raised federal defenses to state claims, all of which could be raised in the State Court proceedings which were pending at the time, and therefore failed to establish federal subject matter jurisdiction. The Court thus dismissed the appeal and vacated the Federal District Court's decision. 685 F.2d 1088 (9th Cir., 1982).

THE QUESTION IS SUBSTANTIAL

The question of whether a state law granting preferential treatment to pregnant employees is violative of the federal equal treatment laws is a novel and substantial one. Although this Court has held that state laws requiring different treatment to persons on the basis of their sex is in violation of the Equal Protection Clause (e.g., *Reed v. Reed*, 404 U.S. 71 (1971)), and has construed the Pregnancy Disability Amendment (PDA), Section 701(k), to require the treatment of pregnancy to be consistent with Title VII principles (see *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983)), this case presents the Court with a case of first impression regarding the issue of whether a state law expressly granting preferential treatment to pregnant employees is a permitted state action that is consistent with and not repugnant to the federal civil rights laws and constitution.

In 1978, Congress amended Title VII by enacting the PDA in order to make clear that pregnancy-based distinctions would be subject to the same scrutiny on the same terms as other acts of discrimination proscribed in Title VII and that pregnant employees had to be treated the same as other employees on the basis of their ability or inability to work. See 5 U.S. Code Cong. & Ad. News 4749, at 4751-2 (1978).

In its decision, the Montana Supreme Court noted that when Congress enacted the Civil Rights Act in 1964, it stated in Section 708 that nothing in Title VII "shall be deemed to exempt or relieve any person from . . . any present or future law of any state . . . other than any such law which purports to require or permit the doing of any act" that would violate Title VII.

The Montana Maternity Leave Act (MMLA) provides that employers shall not "terminate a woman's employment because of her pregnancy" and cannot "refuse to grant the employee a reasonable leave of absence for such

pregnancy." The Montana Supreme Court held that the objectives of the MMLA and Title VII are the same — equality — and that the policy and purpose of the MMLA ("to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females") (infra, p. 4b) is to establish equality.

In its decision, however, instead of analyzing and construing the *State law* — the MMLA — in relation to the Federal law and constitution, which was the only issue on appeal, the Montana Supreme Court applied Appellant's employment policies to see if they violated Title VII.

In light of the unusual treatment of the case by the Montana Supreme Court, it is difficult to indicate to this Court why it is imperative that it should accept this appeal and hear the case (or reverse summarily) without engaging in some argument. Due to the nature of the issues and the Montana Supreme Court's lack of treatment thereof, concomitant with its unique approach to the case, it requires some argumentative points to be made. Appellant therefore requests the Court's indulgence.

In two specious syllogistic schemes, the Montana Supreme Court reasoned and held, first:

1. Appellant discharged Buley because she was pregnant;
2. Title VII prohibits discrimination because of sex, which includes pregnancy;
3. Therefore, Appellant violated Title VII;
4. Since the MMLA prohibits discharges because of pregnancy, as does Title VII, the MMLA is consistent with Title VII.

Second:

1. Appellant's leave policy was facially neutral;
2. Appellant's leave policy was inadequate and had a gender-based disparate impact on pregnant employees under Title VII;

3. Therefore, Appellant violated Title VII;

4. Since the MMLA requires that employers grant leaves of absence to pregnant employees, it is consistent with Title VII.

The fallacies of the Montana Supreme Court's illogic reasoning are many and substantial, and highlight the necessity for this Court's review and disposition. In order of treatment hereinafter, the issues and sub-issues are these: The failure to construe and analyze the MMLA in relation to the federal laws and constitution; the failure to judicially measure the statutory classification within the requisite standards for reviewing laws that are alleged to violate the constitutional requirement of equality; and its improper finding of a violation of Title VII by Appellant under both the disparate treatment and disparate impact theories of discrimination.

The MMLA In Relation to Title VII.

Do Title VII and PDA require equal treatment or do they permit preferential treatment? Does Title VII and PDA preclude states from enacting laws that are inconsistent with the national policy? In legislatively overruling *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), Congress established that the PDA, operating as part of Title VII, prohibits discriminatory treatment. As part of Congress' stated purpose for enactment of the PDA, the following was set forth:

> In enacting Title VII, Congress mandated equal access to employment and its concomitant benefits for female and male workers. However, the Supreme Court's narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment. We are left in a state of national confusion and with inconsistent practices from State to State.
>
> As testimony received by this committee demonstrates, the assumption that

> women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and deadend jobs. [PDA] unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.

5 U.S. Cong. & Ad. News at 4751 (1978).

In the stated basic principles of the PDA, the following was set forth:

> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. [PDA] in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.
>
> The "same treatment" may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work.
>
> . . .

> [PDA] will not require an employer who does not provide disability benefits or paid sick leave to other employees to provide them for pregnant workers. In addition, [PDA] would permit employers who provide a voluntary unpaid leave policy to continue to do so, as long as the plan is not discriminatory. If an employer has a disability insurance plan or paid sick leave policy, he or she will not be allowed to reduce benefits to comply with [PDA]. The only time the employer will be required to allow pregnant workers to use this leave is during the time they are medically unable to work, during the same period of time and under the same terms applicable to other employees.

Id. at 4752-3. Throughout the text of the legislative report, the premise of equal, and not special or preferential treatment, was emphasized.

The enactment of PDA and its equal — and not preferential — treatment was discussed in *Arizona Governing Committee v. Norris,* U.S. , 77 L.Ed.2d 1236, 1248-49 (fn. 14) (1983), as buttressing this Court's holding in *Los Angeles Dep't. of Water & Power v. Manhart,* 435 U.S. 702 (1978), which made these two points: (1) Title VII requires employers to treat their employees as *individuals* and not as simply components of a racial, religious, sexual, or national class (435 U.S. at 708); and (2) classifications based on sex, like those based on national origin or race, are unlawful — for under the statute "even a true generalization about a class cannot justify class-based treatment." 435 U.S. at 708; *Id.* at 1248. Further, as pointed out in *Norris,* the purpose of the PDA is simply to make the treatment of pregnancy consistent with general Title VII principles which forbid special treatment to pregnant employees. *Id.* at 1249 (fn. 14).

Unlike Title VII and PDA, the MMLA does not take into consideration the pregnant employee's ability or inability to work. It grants pregnant employees special employment rights not enjoyed by any other employees. Also, unlike Title VII and PDA, the MMLA does not require a pregnant employee to be disabled from working in order to be eligible for a leave or be protected from discharge. On the other hand, as stated in the statutory provision and noted throughout the legislative history, the PDA only requires equal employment treatment when the pregnant employee is disabled.

The three unlawful acts set forth in MMLA Sec. 203 state that it is unlawful for an employer to:

> "(1) terminate a woman's employment because of her pregnancy;
>
> (2) refuse to grant the employee a reasonable[3] leave of absence for such pregnancy;
>
> (3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits . . ." (emphasis added)

Subsections (1) and (2) apply to employees who are pregnant and not to only those employees who are disabled as a result of pregnancy. Subsection (3), however, specifically delineates the pregnant employee who is disabled as a result of such pregnancy. This distinction is significant because it

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[3] The statute does not specify what a "reasonable" leave shall be, nor the time period to be encompassed. Since the right to a leave is not contingent on disability and since the title of the law is "Maternity Leave," its vagueness could readily be construed to also include time for child rearing, following the termination of the pregnancy and postpartum recovery period. See also MMLA Sec. 204 which requires reinstatement following the "pregnancy-related" leave. (As with Sec. 203, this section provides preferential treatment.)

establishes that the MMLA and the Montana legislature unambiguously stated and intended that subsections (1) and (2) of the MMLA cover any and all pregnant employees, whether or not they are experiencing any kind of disability. Thus, the provisions of the MMLA require an employer to grant a maternity leave of absence to a pregnant employee whether she is able or unable to work.

The question of ability or inability to work is not only a critical feature of the PDA, it has been held to be the touchstone for determining whether or not Title VII has been violated. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court held that the standard for equal employment opportunity is based upon the worker's ability to perform the job:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

401 U.S. at 430-31.

To the Montana Supreme Court, apparently, the employee's working qualifications are irrelevant to both Title VII and the MMLA. Although finding that Buley was terminated because of her inadequate job performance (the same finding made by the Commissioner and District Court),[4] the Court ignored the fact in reaching its decision.

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[4] The Commissioner found that "Mrs. Buley was terminated because she was unable to adequately perform her duties; . . . because she was pregnant." Infra, p. 3d. The District Court found that "[Buley] was terminated because she was not performing her job satisfactorily caused by her pregnancy related sickness." Infra, p. 2c. The Supreme Court, after setting forth specific job performance problems experienced with Buley, stated that ". . . Miller-Wohl terminated Tamara's

While it is also a fact that Buley's unsatisfactory performance was occasioned by her pregnancy, the failure of the Court to analyze the MMLA based upon the national policy expressed in *Griggs* raises the significant question of Griggs' authoritativeness. Therefore, this Court should resolve this important point. Is a State employment discrimination law that is *not* grounded on the employee's working qualifications in contradiction of the Federal law and national policy?

Was the PDA intended to apply only to policies and practices of employers? Does the PDA exempt State laws from inclusion within the meaning and prohibitions of Title VII? According to the legislative history of the PDA, Congress sought to preclude both employers and States from treating pregnancy-related disabilities differently from the various other physical or medical conditions that may temporarily disable a worker. Pregnant employees who are able to work must be allowed to work on the same basis as other employees; and when they are disabled for medical reasons, they must be accorded the same rights, leave privileges and benefits as other employees who are disabled from working. (See, S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977), *reprinted in* Leg. Hist. at 41.)

As the following exchange between Senators Hatch and Williams reveals, the intent of the sponsors was that States would be free to act *only* within the non-discriminatory context established by the PDA:

> Mr. Hatch. Do the managers and sponsors of this bill intend S.995 to be preemptive of State laws so that no employer shall be required to take any action with regard to any pregnancy related disability benefit, or to pay any such benefit which shall exceed the requirements of this act, by reason of any State or local law . . . ?

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employment, undoubtedly because her pregnancy diminished her effectiveness as a sales clerk." Infra, p. 5b.

> Mr. Williams. . . . Title VII does not preempt State laws which would not require violating Title VII. This is made clear by existing law. Section 708 of Title VII, as well as section 706(c), expressly provides that State laws which protect employees from discrimination shall remain in effect unless they operate to permit or require discrimination . . . .
>
> . . . it would be a question of whether there was discrimination . . . . [If] the classification and selection were discriminatory, then the State law that discriminated would not be permitted to stand . . .

124 Cong. Rec. S. 29643-4 (daily ed., Sept. 16, 1977), *reprinted in* Leg. hist. at 78-79.[5]

Based upon the foregoing, this Court should provide guidance as to the meaning and intent of Title VII and PDA as it relates generally to State laws (and specifically to the MMLA) that require special or preferential treatment for pregnant employees to the exclusion of all other employees.

The MMLA in Relation to the Equal Protection Clause.

Since the MMLA identifies pregnant employees as a distinct and separate group of employees who require special benefits, should it share the same scrutiny with

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[5] Despite its holding that the objectives (i.e., equality) of the MMLA and PDA are consistent, the Montana Supreme Court tacitly admitted that the MMLA provides special treatment to a special class of employees when it embraced the doctrine of extension. In its summary of determination, the Court stated:

> "(6) By the simple expedient of requiring an employer to extend the same leave rights to all employees temporarily disabled as are extended to pregnant women under the MMLA, the Montana legislative purpose to provide equality of opportunity in employment could be preserved, and the provisions of the MMLA and Title VII reconciled."

Infra, p. 4b.

other forms of protective or beneficial legislation that have singled out females for special and different treatment? While there is no doubt that pregnancy is different from other physical or medical conditions that may cause an employee to become temporarily disabled from working, should that fact be irrelevant in the employment setting? Is the MMLA a gender-based law that mandates a finding of its being "substantially related" (as opposed to "rationally related") to an important state interest? If so, does it meet (or fail) an equal protection challenge?

This Court has explained that a statute intended to benefit females will not necessarily pass judicial muster:

> Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection. (citations omitted) Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored.

Orr v. Orr, 440 U.S. 268, 283 (1979).

Even the noble purpose of the MMLA, as expressed by the Montana Supreme Court, does not alter the fact that it appears to be gender-based legislation requiring special protection for pregnant workers as a form of compensation for their special burden. This Court has made it clear that:

> [I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap . . . , the objective itself is illegitimate.

Mississippi University for Women v. Hogan, 458 U.S. 718, 725 (1982). Moreover, as set forth in the *Mississippi University* case, gender-based legislation will be upheld only when a legitimate and substantial goal is actually furthered by the maintenance of a sex-based disparity:

> The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

Id. at 732, n.17.

Can an admittedly preferential law that measures people in the abstract, and which is contradictory to both the Federal and Montana *equal* employment opportunities legislation (Title VII and MHRA), achieve a legitimate and substantial governmental objective? Is the MMLA the only reasonable alternative or remedy available? Or is there sufficient legislation and constitutional protection of women regarding employment and pregnancy discrimination? Are not Title VII and PDA designed specifically to equalize job opportunities for pregnancy-disabled workers and to insure their stability in the workplace?

The Use and Findings of Disparate Treatment and Disparate Impact.

Unfortunately, the Appellant — and not the MMLA — was put on trial by the Montana Supreme Court. Whether Appellant complied with or violated Title VII was not the issue in any of the proceedings involving this case. The only issue in review for the Montana Supreme Court and, respectfully submitted, for this Court is whether the MMLA is in violation of Title VII and the Equal Protection Clause.

Without being given the opportunity of defending itself, the Montana Supreme Court found Appellant in violation of Title VII. This was accomplished without the requisite standards of proof so carefully pronounced and emphasized by several Supreme Court decisions. With regard to discrimination because of disparate treatment, the case of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), clearly enunciated the special order of proof in such cases. The initial stage is described as plaintiff's

making out a prima facie case by adducing evidence consisting of 4 factors. If the plaintiff makes out a prima facie case, the burden then shifts to defendant to articulate a legitimate non-discriminatory reason for its action. This "shifting burden" is one of going forward with the evidence; it is *not* one of persuasion, which was the primary holding in *Burdine*.

In the instant case, Appellant never had the privilege (let alone the right) of the required order and allocation of proof. The Montana Supreme Court's decision therefore must be reviewed in this light. This Court must determine if its well-developed requirements of proof have application to a State court's decision regarding alleged discrimination under Title VII when the issue is whether the State law violates Title VII.

Just as significantly, the Court found Appellant guilty of Title VII discrimination on the theory of disparate impact *without* benefit of the required tripartite order and allocation of proof. The clearly-established scheme of proof in disparate impact cases provides that a plaintiff must prove that the facially-neutral employment standard has a significantly discriminatory impact. After the establishment of such proof, the burden shifts to the defendant-employer, who must demonstrate that "any given requirement has a manifest relationship to the employment practice in question." Should the employer meet its burden, the plaintiff can overcome the defense by proving that the employer was using the practice as a mere pretext for discrimination. *Connecticut v. Teal,* 457 U.S. 440, 447-48 (1982). Needless to say, since the instant case did not involve the question of whether or not Appellant violated Title VII — nor was a prima facie case of disparate impact ever presented — the Montana Supreme Court's decision appears to contravene the requirements espoused by this Court. Whether such contravention should stand as a diversion from the primary issue in the case is of significance and should be resolved by this Court.

Additional Basis For Judicial Guidance.

As stated at the outset, this is a case of first impression for this Court. However, it is not the only case where the issue of special treatment for pregnant employees is before the Courts. In a case pending before the Ninth Circuit Court of Appeals, the issue involves a California law that requires special treatment for pregnant employees. In *California Federal Savings & Loan Ass'n. v. Guerra,* F.Supp. , 34 FEP Cases 562 (C.D. Cal. 1984), the Federal District Court construed the California statute and held that a State law requiring an employer to give females disabled by pregnancy preferential treatment and rights for a period of time after the conclusion of the disability leave of absence was in conflict with and violative of Title VII.

Pending before the Massachusetts Supreme Court is a case wherein one of the issues is whether preferential treatment for pregnant employees should be read into a State law. In *Solomon v. School Committee of the City of Boston,* No. SJC-3669, a discharged teacher is seeking to have the time she was on a pregnancy leave credited to her for purposes of granting her tenure status under the Massachusetts law.

The issues involved in the instant case and the *California Federal Savings & Loan* case have received prominence and notoriety. These cases were featured on the CBS-TV news program "60 Minutes" on December 2, 1984.[6]

Thus, the issue(s) in the instant case have a significance to the courts — Federal and State — and to employers and employees throughout the United States. Should nationwide employers (like Appellant) consider Title VII as exclusive? Or do they have to alter their policies and practices to conform to different State laws? If an employer

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[6] NBC-TV has also expressed an interest in the issue in the instant case. They have indicated a desire to feature the case in a forthcoming news program to be entitled "Women in the Workplace."

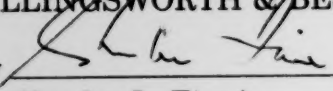
complies with a special-treatment law in one State, has it engaged in disparate treatment when it acts differently in another State? Is there a conflict between State and Federal laws when an employer cannot comply with both the Federal and State laws? These "horns-of-a-dilemma" problems were the reasons for the Appellant to question the legality of the Montana Maternity Leave Act. Now, as then, resolution of the issue(s) is of grave importance and urgency to/for the courts, legal representatives, and employers and employees.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

RESPECTFULLY SUBMITTED,

O'CONNOR, CAVANAGH,
ANDERSON, WESTOVER,
KILLINGSWORTH & BESHEARS

By 

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[Docketed by Court on February 1, 1985]

IN THE SUPREME COURT
OF THE STATE OF MONTANA

THE MILLER-WOHL COMPANY, INC.,	)	
Appellant,	)	
vs.	)	
COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, AND TAMARA L. BULEY,	)	NO. 84-172
Appellees.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Miller-Wohl Company, Inc., the above captioned Appellant, hereby appeals to the United States Supreme Court from the final judgment of the Supreme Court of the State of Montana, reversing the judgment and order of the District Court and reinstating the Commissioner's Findings, Conclusions and Order, entered in this action on December 28, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

* * *

DATED this 28th day of January, 1985.

O'CONNOR, CAVANAGH,
ANDERSON, WESTOVER,
KILLINGSWORTH & BESHEARS

By /s/ Charles L. Fine
Charles L. Fine
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Notice of Appeal to the Supreme Court of the United States was mailed, first-class postage prepaid, this 29th day of January, 1985, to the following counsel of record:

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No. 84-172

IN THE SUPREME COURT OF THE
STATE OF MONTANA

1984

[692 P.2d 1243]

THE MILLER-WOHL COMPANY, INC.,
Petitioner and Respondent,

v.

COMMISSIONER OF LABOR AND INDUSTRY,
STATE OF MONTANA, AND TAMARA L. BULEY,
Respondents and Appellants.

APPEAL FROM:
District Court of the Eighth Judicial District, In and for the County of Cascade, The Honorable Joel G. Roth, Judge presiding.

COUNSEL OF RECORD:

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For Amicus Curiae:

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Kathleen F. Holden for Montana Human Rights Commission, Helena, Montana
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Submitted: September 26, 1984
Decided: December 28, 1984

FILED: DEC 28 1984
/s/ Ethel M. Harrison
Clerk

Mr. Justice John C. Sheehy delivered the Opinion of the Court.

This is an appeal by Tamara L. Buley and the Commissioner of Labor and Industry from a judgment of the District Court, Eighth Judicial District, Cascade County, finding the Montana Maternity Leave Act invalid and reversing a decision of the Commissioner in favor of Tamara for back wages and penalties.

We reverse the judgment of the District Court.

We determine for the purpose of this action that the employment policy of Miller-Wohl was one of no leave of absence for temporarily disabled employees until the end of their first year of employment.

In short summary of our decision, we make the following determinations:

(1) Miller-Wohl's discharge of Tamara because of her pregnancy was in direct violation of the Montana Maternity Leave Act (MMLA). Moreover, as Title VII of the Civil Rights Act of 1964, and the Pregnancy Discrimination Act of the federal government are interpreted by federal regulations, it appears that Miller-Wohl's no leave policy and discharge of Tamara may have violated those federal acts.

(2) Usually an attack on legislation alleged to be discriminatory is mounted by a person discriminated against. In this case Miller-Wohl, as an employer, was not discriminated against by the MMLA, but it nevertheless has standing to raise validity of MMLA.

(3) Miller-Wohl's no-leave policy created a disparate effect on women who become pregnant, compared to those employees who do not become pregnant. Although facially neutral, its no-leave policy subjected pregnant women to job termination risk on a basis not faced by men. The no-leave policy therefore was sexually discriminatory in violation of Title VII and the Pregnancy Disability Act.

(4) The policy and purpose of Title VII and the PDA is to eliminate discrimination in employment policies.

(5) Miller-Wohl's termination of Tamara directly violated the MMLA. The policy and purpose of the MMLA is to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females. Its objective in that field, equality, is the same as the objective of Title VII. We do not agree that MMLA violates Title VII because it is gender-based in its operation, in that it protects women without at the same time protecting others equally.

(6) By the simple expedient of requiring an employer to extend the same leave rights to all employees temporarily disabled as are extended to pregnant women under the MMLA, the Montana legislative purpose to provide women equality of opportunity in employment could be preserved, and the provisions of the MMLA and Title VII reconciled.

(7) Courts have recognized judicial power in discrimination cases to save the legality of questioned legislative enactments by the doctrine of extension, extending the same benefits to those who would otherwise be discriminated against. This case presents a proper one for judicial extension. However, because the legislature is meeting shortly we defer to the legislature for its action in this field.

(8) We find the MMLA valid.

I.

Miller-Wohl hired Tamara Buley as a retail sales clerk at its Three Sisters store in Great Falls, Montana on August 1, 1979. She was employed to work full time (34–36 hours a week) during the store's two busy months, August and December, and part time (16–20 hours a week) for the rest of the year. She was, according to the store manager, a "regular employee."

Tamara missed two and a half days of work during her first week on the job because of what she thought was the 'flu. On August 13, 1979, she discovered she was pregnant and soon after told her supervisor. During the next two weeks she suffered from "morning sickness." She felt nauseated and faint, and as a result missed time from work, had to leave the selling floor for breaks, and spent considerable time in the store bathroom vomiting, and was sent home early on occasion. On August 27, 1979, Miller-Wohl terminated Tamara's employment, undoubtedly because her pregnancy diminished her effectiveness as a sales clerk.

Tamara filed a complaint against Miller-Wohl with the Montana Commissioner of Labor and Industry (Commissioner). She claimed that Miller-Wohl had violated the Montana Maternity Leave Act (MMLA).

Miller-Wohl then brought suit against the Commissioner and Tamara in United States District Court for the district of Montana, asking the federal court to declare the MMLA invalid and to enjoin its enforcement. The court issued a temporary restraining order for a brief period, but then permitted the state agency to proceed.

On October 1, 1980 the Commissioner held a hearing and on October 3, 1980 issued an administrative order with findings and fact and conclusions of law that Miller-Wohl had violated the MMLA by dismissing Tamara Buley; that the MMLA neither offended Equal Protection guaranties nor was preempted by Title VII of the Civil Rights Act of 1964; and that Tamara was entitled to back pay and penalties in the amount of $6,573.60.

The federal district court concurred in the Commissioner's conclusions. Miller-Wohl Co. v. Commissioner of Labor and Industry, 515 F.Supp. 1264 (U.S.D.C. Mont. 1981). In addition the federal court found that Miller-Wohl could comply with the PDA and MMLA by simply granting leave to all employees who miss work because they are sick or disabled. 515 F.Supp, at 1267.

The decision of the federal district court was appealed to the U.S. Court of Appeals for the Ninth Circuit. That court determined none of the issues. Instead it concluded that Miller-Wohl's complaints failed to present an affirmative federal claim over which the court could assert jurisdiction and dismissed the action. Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry, et al. 685 F.2d 1088 (U.S.C.A. 9, 1982). This dismissal left the District Court opinion without precedential effect.

Miller-Wohl also petitioned the state court for a review of the Commissioner's decision. On February 8, 1984, the District Court for Cascade County reversed the Commissioner's order. The District Court held that the MMLA is discriminatory, is a denial of equal protection of the law, is a protective and preferential statute favoring nondisabled pregnant employees to the discrimination of disabled nonpregnant employees and disabled male employees, and is preempted by Titles VII and XI of the Federal Civil Rights Act.

The Commissioner and Tamara appeal from the decision of the District Court, which brings the case to us for determination.

II.

The MMLA was adopted by the legislature in 1975 (formerly Section 39-7-201, -208, MCA, (1978); now Section 49-2-310, -311, MCA, (1983)). It provides in pertinent part:

> "Maternity Leave — Unlawful Acts of Employers. It shall be unlawful for an employer or his agent to:
>
> "(1) terminate a women's employment because of her pregnancy;
>
> "(2) refuse to grant to the employee a reasonable leave of absence for such pregnancy; . . ."

The MMLA is a legislative recognition of changing economic mores in American family life. We are told that in 40% of American households there is a working wife or mother. A growing number of single women support themselves, or themselves and children. In family households the need for two paychecks spreads across the economic spectrum. Even young upwardly-mobile professionals (Yuppies), like a biplane, need two wings working to stay aloft. Economic necessity has converged with the growing insistence of women for equal opportunity in all fields to bring about legislative enactments such as the MMLA. The biblical imprecation that the male shall eat his bread by the sweat of his brow has been broadened; Eve is now included.

Congress has responded to these forces by including in the Civil Rights Act of 1964 provisions outlawing discrimination in employment because of gender. Section 703(a)(1) of the Act provides that it is an unlawful employment practice for an employer:

> "to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin, . . .*" 42 U.S.C. § 2000e-2(a)(1)

The provisions of the Civil Rights Act of 1964 relating to sex discrimination in employment (hereafter Title VII) were tested in General Electric Co. v. Gilbert (1976), 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343. General Electric, as a self-insurer, had provided nonoccupational sickness and accident benefits to all its employees amount to 60% of their straight-time weekly earnings up to a maximum of 26 weeks. Several women employees became pregnant while employed by General Electric, and while the plan was in effect, and presented a claim to the company for disability benefits under the plan to recover for the period while each was absent from work as a result of the pregnancy. The claims were routinely denied on the ground that the plan

did not provide disability benefit payments for any absence due to pregnancy. The women employees charged that the refusal of General Electric to pay disability benefits under the plan for time lost due to pregnancy and child birth discriminated against them because of sex, and so violated Title VII. The United States Supreme Court refused to recognize the propriety of an Equal Employment Opportunity Commission guideline that pregnancy disability should be treated on the same terms and conditions as other temporary disabilities, and held that pregnancy-related disabilities constitute an additional risk unique to women, and that the failure of General Electric to compensate women for this risk did not destroy the presumed parity of the benefits accruing to men and women alike which resulted from the facially evenhanded inclusion of risks in General Electric's Plan.

The congressional response to the decision in *Gilbert* was an amendment in 1979 to Title VII to include the Pregnancy Disability Act, Section 701(k) (PDA). The pertinent provision of PDA is:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in Section 703(A) of this Title shall be interpreted to permit otherwise . . ."

The outpouring of congressional statements at the time of the passage of PDA in the House and Senate Reports and by House members and senators on the floors of their respective houses indicate the passion and determination of congressional members to ban discrimination of all types

in employment practices. Illustrative with respect to the PDA was the House Report:

> "As testimony received by this Committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low paying and deadend jobs. H.R. 6075 [PDA] unmistakenly reaffirms that sex discrimination includes discrimination based on pregnancy and specifically defines standards which require the pregnant workers be treated the same as other employees on the basis of their ability or inability to work." 5 U.S. Code Cong. & Admin. News 4749, 4751 (1978).

In adopting the Civil Rights Act of 1964, and the PDA, Congress indicated its intention to permit state action consistent with those acts. Section 42 U.S.C. 2000h-4 reads:

> "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such Title operates or to the exclusion of state laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of state law unless such provision is inconsistent with any of the purposes of this Act, or any provisions thereof."

Title VII of the Act, concerning employment discrimination also contains a section, Section 42 U.S.C. 2000e-7 which reads:

> "Nothing in this subchapter [Title VII] shall be deemed to exempt or relieve any person from any liability, duty, penalty or punishment provided by any present or future law of any state or of any subdivision of a state, other than any such law which proports to

> require or permit the doing of any act which would be an unlawful employment practice under this chapter."

One further provision of the MMLA should be noted. Reinstatement of the pregnant employee after leave of absence is required in the Act. Former Section 39-7-204 (now Section 49-2-311) provides:

> "*Reinstatement of job following pregnancy-related leave of absence.* Upon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits, unless in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

The foregoing paragraphs summarized the federal and state enactments under which Tamara's case must be resolved.

III.

The issue to be decided here is whether the MMLA is invalid because of, or preempted by, Title VII and the PDA. If the answer is affirmative, Tamara has no case and the judgment in the District Court must be affirmed.

On her appeal Tamara contends that the MMLA is consistent with the purposes of Title VII which is to eliminate employment discrimination between the sexes; that the MMLA does not violate Title VII because it does not limit, deprive or adversely affect the employment opportunities of any individual; that the MMLA which grants reasonable leave for pregnancy disabilities is not a state protectionist law in violation of Title VII; that the MMLA is not preempted by Title VII for the reason that Congress did not intend to preempt state laws by the passage of PDA

and in fact specifically examined and approved the MMLA; that MMLA is not unconstitutional as a denial of Equal Protection Laws because pregnancy disability laws are not subject to constitutional scrutiny, but if they are, the MMLA bears a close and substantial relationship to the legitimate state objective of eliminating employment discrimination against women because of pregnancy.

The Commissioner contends that the MMLA, viewed in the light of the purposes of Title VII, is not inconsistent with federal law and so is not preempted by the same; in addition he contends that Miller-Wohl may not attack the MMLA with a policy which in itself violates Title VII; Commissioner further contends with respect to the Equal Protection argument that legislation based on pregnancy is not a gender-based classification for the purpose of equal protection analysis and need only be justified on a reasonable basis, but even so, the MMLA could survive the more difficult test for gender-based classifications, in that the MMLA bears a substantial relationship to an important state interest.

The Montana Human Rights Commission, appearing amicus curiae, supports the constitutionality and validity of the MMLA, contending that the federal constitution does not prohibit the use of gender-based classifications; that the MMLA bears a close and substantial relationship to important government objectives; that the individual dignity section of Article II of the Montana Constitution does not prevent the exercise of the legislature's power to enact statutes containing gender-based classifications; that the MMLA is not preempted by the federal acts; and that in the alternative, this case is not ripe for decision by us on constitutional grounds and we should remand the case for further proceedings rather than hold MMLA unconstitutional.

The combined brief of the American Civil Liberties Union, the National Organization for Women, the NOW Legal Defense and Education Fund, and the League of

Women Voters, appearing amici curiae, while supporting the objective of Tamara generally, takes a somewhat different tack. These amici contend that if this Court construes the MMLA to permit employers to grant greater employment benefits to pregnant employees than to others similar in their ability or inability to work, the MMLA would conflict with Title VII; on the other hand, the MMLA and Title VII impose complementary obligations on employers and so this Court should declare that Montana employers must comply with both statutes to remove any apparent conflict between the two. Therefore this Court should extend MMLA's provisions in a nondiscriminatory fashion rather than invalidate the statute and deny all Montana citizens a benefit the legislature intended to confer.

On the other hand, Miller-Wohl, as the respondent on appeal, contends that the MMLA is defective because it does not require the pregnant employee to be disabled from working in order to be eligible for a leave of absence or protected from discharge, and it is therefore discriminatory as to other employees of Miller-Wohl; that the District Court was correct when it found that the MMLA was preempted and superseded by and in violation of Titles VII and XI of the Civil Rights Act; that the MMLA is a protective and preferential statute and conflicts with Title VII in that it is impossible for a Montana employer to comply with the MMLA and Title VII at the same time; that the MMLA violates the Equal Protection Clause of the Fourteenth Amendment because it provides different treatment of persons on the basis of their sex; that in determining the equal protection argument the intermediate tests or affirmative action test should be applied; and that the MMLA has no close or substantial relationship to any governmental interests.

The Women's Law Section of the State Bar of Montana, appearing amicus curiae, supports the appellants in contending that the MMLA is not preempted by Title VII; that under traditional equal protection analysis the MMLA does not create a gender-based classification; but if the

MMLA does create a gender-based classification, it is not an invidious discrimination.

The Montana Education Association, appearing amicus curiae, also supports the appellants, contending that the MMLA is not preempted, and does not violate constitutional equal protection guarantees; that it is not an unlawful protective legislation, and that it protects an important state governmental interest.

III.

Miller-Wohl is a chain that operates about 290 ladies' wear stores throughout the United States. Four such stores are located in Montana.

On the face of them, the written employment policies of Miller-Wohl are nondiscriminatory. The employment policies are printed in a booklet, at least one copy of which is kept at each store, sometimes distributed to employees (Tamara says she did not receive one), and the provisions explained and discussed with the store managers at employee meetings. The written employment policies contain the following provisions which are pertinent to this case:

> "It is the policy of the Miller-Wohl Company to forbid acts of discrimination in all matters dealing with employees . . .
>
> "It has been the established policy of Miller-Wohl to provide equal employment opportunities to all qualified applicants who seek job opportunities with the Company at every level of employment. Hence, we do not discriminate against anyone because of race, color, age, sex, or religion.
>
> ". . .
>
> "11. Sick Leave:
> All regular full-time employees with one year seniority are entitled to receive up to five days

of sick leave with pay for legitimate illness incurred during the calendar year.

". . .

"16. Leaves of Absence:
All employees, after one year of seniority, may receive a leave of absence in cases of protracted illness. Such leaves of absence shall be for three months. If the employee requires more than three months, an additional three months may be granted upon reapplication.

"All other types of leaves are strictly within the discretion of the Manager.

". . .

"17. Maternity:
When an employee leaves for pregnancy, she will be granted a leave of absence for a period of time that includes the post-natal physical examination."

". . .

"22. Time Off:
If you need to have time off from your job, make your request to your Manager. A limited amount of time off may be granted for good reason.

"Absence is considered to be excused for the following reasons only:

"1. Illness certified by doctor's certificate; 2. A death in the employee's immediate family; 3. A wedding in the employee's immediate family; 4. With the Manager's permission.

". . .

"28. Extension of Benefits:
The benefits described herein are intended

> primarily for the regularly working employee. As such, the benefits are directed toward the full-time and regular part-time employees. These benefits, however, may be extended to other employees within the discretion and approval of your Manager and District Supervisor."

It may be gleaned from the foregoing paragraphs of the employment policies of Miller-Wohl that all employees may receive a leave of absence without pay in cases of protracted illness. In cases of maternity, there is a provision that the woman will be granted a leave of absence for a period of time that includes post-natal physical examination. Regular full-time employees with one year seniority earn sick leave based on the years in service. Time off for good reason will be granted; and finally those benefits which are intended primarily for the full-time and regular part-time employees may also be extended to other employees in the discretion of the manager.

Because the written policies indicate that Miller-Wohl would extend to pregnant women a reasonable leave of absence to cover their disabled time, without pay, it is suggested to us by the ACLU, NOW, and the League of Women Voters that this clause should be remanded for clarification of dispositive factual issues as to whether Miller-Wohl granted such leaves, and under what circumstances. Undoubtedly, evidence that Miller-Wohl had granted some employees leave for an appendectomy, a broken limb, or other reason, but had refused Tamara leave for her pregnancy disability would automatically suggest that Miller-Wohl applied its discretionary leave in a discriminatory way. McDonald Douglas Corp. v. Green (1973), 411 U.S. 792. We decline to take that position, however, because under the testimony in this case, Miller-Wohl's actual handling of leave for pregnancy cases belies the benign provisions of its written employment policies. The area supervisor for Miller-Wohl testified:

"Q. In regard to the one year requirement, as a supervisor and earlier when you were a store manager, was there meetings with the store managers by the supervisor in regards to these items? A. Yes.

"Q. What was said if anything in regards to this ah, maternity leave and sick leave benefits provisions? A. It was pointed out that in the company's manual that unless an employee had been in employment with us for a minimum of one year the policy would not be deviated from. It would hold true.

"Q. And this policy applies to male and female employees? A. Yes it does.

"Q. Have you had employees with less than one year of employment who are pregnant, or sick, or ah injured, or ah, I mean an off the job injury or other reasons for a leave of absence to be requested and not granted? A. Would you like to rephrase that one more time? You talk too fast.

"Q. Try again. Sorry. Have you had employees with less than one year of employment who have been pregnant, or ill, or injured, or some other meritorious reason for requesting or seeking leave of absence? A. No one has ever been given leave of absence without being employed for us for one year at least."

The store manager from the Great Falls store testified:

"Q. Did Tamara Buley have a guide? A. It was made available to her, yes.

"Q. Did you discuss it with her? A. Yes we did.

"Q. Did you discuss the one year requirement for benefits? A. Yes we did.

"Q. Is that discussion of the one year benefit brought to the attention of the employees?

A. It was brought to the attention of any one that comes to work in the store."

The testimony of the area supervisor and of the Great Falls store manager makes it clear that despite the language contained in the employment guide provisions which relate to employment policy, in actuality Miller-Wohl conducts a policy of no leave for any disabled employees with less than one year employment experience with Miller-Wohl. We therefore determine this case in the circumstance that in actual practice Miller-Wohl extended no leave of absence from employment to any temporarily disabled employee until the end of the first year of employment.

IV.

Under the MMLA, it is unlawful in Montana for an employer to terminate a woman's employment because of her pregnancy, or to refuse to grant the employee a reasonable leave of absence for such pregnancy. Miller-Wohl clearly violated this statute. Section 49-2-310, MCA (1983).

Therefore, unless the MMLA is invalid as contended by Miller-Wohl, the Commissioner was correct in determining a violation of the MMLA had occurred, and that Tamara was entitled to back pay and penalties for her wrongful discharge. See section 49-2-311, MCA (1983).

The latest pronouncement by the United States Supreme Court of which we are aware in the field of pregnancy-related employment practices is Newport News Ship Building and Dry Dock Company v. EEOC. (1983), U.S. , 103 S.Ct. 2622, 77 L.Ed.2d 89.

In *Newport News,* the employer had provided a health insurance plan which contained hospitalization benefits for pregnancy-related female disabilities but provided less extensive pregnancy benefits for spouses of male employees. The Supreme Court held that the limitation of benefits for spouses of male employees discriminated against the male employees in violation of section 703(a)(1) of Title

VII. In holding that Congress by enacting the PDA had overturned the Supreme Court's holding of General Electric Co. v. Gilbert, supra, the Supreme Court found that differential treatment of pregnancy is gender-based discrimination because only women can become pregnant, that the PDA makes it clear that discrimination based on pregnancy is on its face discrimination based on sex and that it is discriminatory to exclude pregnancy coverage from an otherwise inclusive benefits plan.

Tamara's case presents a somewhat different aspect than *Newport News*. Female spouses of male employees were not included in the *Newsport News* benefits plan though female employees were; in Miller-Wohl's case its no-leave policy for employees under one year of employment experience applies equally to male and female employees.

While Miller-Wohl's no-leave policy was facially neutral as to Tamara and her class, it should not escape us that Tamara is not so much before us because of refusal to grant her pregnancy leave. She was in fact terminated from her employment. She was discharged because she was pregnant. Title VII provides that it is an unlawful practice for an employer to discriminate against any individual with respect to his employment "because of . . . sex." Under the PDA, the term "because of sex" includes "because of . . . pregnancy . . . ; women affected by pregnancy . . . shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ." Section 701(k), PDA (42 U.S.C. 2000e(k)).

When Title VII as amended by the PDA is understood properly, it becomes clear that the discharge from her employment of a woman for her pregnancy, without more, is an unlawful practice under Title VII and the PDA. It is a gender-based discrimination. The discharged pregnant woman is not treated the same for all employment-related purposes as all other persons not so affected, obviously, because men cannot be discharged for the same reason. The

intent of Title VII and the PDA that women should be treated equally with men on matters of employment means that women cannot be discharged simply because they are pregnant.

Tamara's disability came relatively early in her pregnancy. Not all women suffer from "morning sickness." Many pregnant women seem to be able to work nearly to the hour of their delivery, and to return to employment shortly after delivery. Inevitably, however, childbirth involves some period of disability. Testimony before the House Committee on Education and Labor, considering the adoption of the PDA, indicated that normal period of pregnancy leave is about six weeks. HR Rep. No. 95-948, 5 U. S. Code Congressional and Administrative News 4749, 4753 (1978). An employer's no-leave policy therefore poses a drastic effect on women employees of childbearing age, an impact no male would ever encounter.

In Abraham v. Graphic Arts International Union (USCA 1) (1981), 660 F.2d 811, the employer of a temporary employee had a policy of granting ten days leave and no more to any disabled employee. Abraham was hired for a temporary project, as long as it received funding. She was discharged for work absence incidental to her impending motherhood. She had been given no leave of absence for her pregnancy. The circuit court held:

> "An employer can incur a Title VII violation as much by lack of an adequate leave policy as by unequal application of a policy that it does have. Title VII outlaws employment discrimination traceable to an employee's gender, and it takes little imagination to see that an omission may in particular circumstances be as invidious as positive action. As the Equal Employment Opportunity Commission had declared:
>
> "'[W]here the termination of an employee who was temporarily disabled is caused by an employment policy under which insufficient

> or no leave is available, such a termination violates the Act if it has a disparate impact on employment of one sex and is not justified by business necessity.'
>
> "Beyond peradventure, the limitation of leave to ten days affected women employed in PEP program much more severely than any male engaged therein, or elsewhere in the union's hire. It therefore cannot afford the union refuge unless demonstrably it was required by the exigencies of the project, a matter to which we now turn." 660 F.2d at p. 619."

The Abraham case was remanded by the Circuit Court to the United States District Court for the reason that summary judgment in favor of the employer was improper. The reasons given by the circuit court for the remand are cogent in this case, for the principle remains the same, the employer provided a leave policy that was inadequate for pregnant women and gender-based in its impact upon one sex as compared to the other.

Miller-Wohl's no-leave policy created a disparate effect on women who become pregnant compared to men who do not become pregnant. Although the policy was facially neutral, it nonetheless subjected pregnant women to job termination on a basis not faced by men. The no-leave policy therefore appears to us to be gender-based discrimination by an employer in violation of Title VII and the PDA.

V.

The appellants point out that usually an attack on legislation because of its discriminatory effect is mounted by a person discriminated against. Here Miller-Wohl as an employer was not discriminated against. Appellants therefore claim that Miller-Wohl has no standing to claim that the MMLA was discriminatory. We conclude however that the impact upon Miller-Wohl is direct and substantial and it has standing to raise the validity of the MMLA as such an employer.

VI.

Sorting out the legal issues in this case is like walking through a hall of mirrors, so many facets are presented; or it is like examining a bagful of inconsistencies, such differing interpretations of the federal and state statutes are given us.

Miller-Wohl violated MMLA; it claims not to have violated Title VII, and the PDA, but to have complied with the letter of those federal laws. Miller-Wohl claims it cannot obey both sets of laws.

The District Court and Miller-Wohl find that the MMLA is protectionist legislation favoring one sex above the other.

Yet the District Court held, and Miller-Wohl contends, that the MMLA is not [sic] gender-based, because MMLA discriminates in favor of pregnant women over non pregnant women.

Tamara, the Commission, and most amici see no conflict between the MMLA and Title VII, as amended by PDA; they contend that the objectives of the state and federal legislation are the same, to provide for equality for women on the job market.

The ACLU, NOW, and the League of Women Voters see in MMLA the kind of protectionist legislation that historically hurt rather than helped women, and kept them in marginal jobs; yet these amici would preserve the MMLA by judicially extending its benefits to all sexes.

The Commissioner sees no gender-based discrimination in MMLA, pointing to the protection of both sexes by preserving the right of husbands and wives to procreate and raise a family without sacrificing the income of the wife to support the family after pregnancy.

In the construction of statutes, we are directed by law to construe their provisions liberally with a view to effect their objects and to promote justice; when a statute

is equally susceptible to two interpretations, one in favor of natural right and the other against it, the former is to be adopted. Sections 1-2-103, -104, MCA.

In attacking the MMLA, Miller-Wohl contends that the Montana statutes are in violation of the equal protection clause of the federal constitution, are discriminatory, and are preempted and superseded by and in violation of Titles VII, and XI, of the Civil Rights Act.

First Miller-Wohl states that the MMLA favored nondisabled pregnant employees to the exclusion of all other employees. It points to an internal difference found within the MMLA:

> "It shall be unlawful for an employer or his agent to:
>
> "(1) Terminate a woman's employment because of a pregnancy;
>
> "(2) Refuse to grant to the employee a reasonable leave of absence for such pregnancy;
>
> "(3) Deny to the employee *who is disabled,* as a result of pregnancy any compensation to which she is entitled to the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of said pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; . . ."

Miller-Wohl claims that subsections (1) and (2) of section 49-2-310, MCA, apply to all employees who are pregnant, and not to employees who are disabled as a result of pregnancy, in contrast to subsection (3) which specifically delineates the pregnant employee *who is disabled* as a result of such pregnancy. Thus, Miller-Wohl claims that the provisions of MMLA require an employer to grant maternity leaves of absence to nondisabled pregnant employees as well as to pregnant employees and in that manner is

discriminatory, protective, preferential, and in contradiction of Title VII.

Miller-Wohl further contends that MMLA offends Title VII of the Civil Rights Act as amended by the Pregnancy Disability Act, section 701(k) with respect to the following language:

> ". . . and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this Title shall be interpreted to permit otherwise. . ."

Miller-Wohl contends that the federal law requires equal employment policy only when the pregnant employee is disabled and therefore the state law is in conflict with the federal law.

We reject Miller-Wohl's arguments on these points. Miller-Wohl is arguing on a statement of facts that are not before this Court, and were not before the District Court nor the Commission. We are not considering in this case a nondisabled pregnant employee. Tamara Buley was disabled by virtue of her pregnancy, and eventually was discharged for that disability.

Disability as a result of pregnancy is not the *sine qua non* for the application of PDA; it requires no more than the "medical condition" of pregnancy. The PDA states:

> "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to because of or on the basis of pregnancy, childbirth or related medical conditions . . ." 42 U.S.C. 2000e(k).

We agree with Judge Paul G. Hatfield, who determined this argument with clarity:

> "First, under the Equal Protection Clause, as contrasted with the statutory Pregnancy Discrimination Act discussed infra, men and women are not treated unequally when pregnancy is the one physical condition given preferential treatment. Rather, by removing pregnancy-related disabilities as a legal grounds for discharge from employment, the MMLA places men and women on more equal terms. All workers, male or female, disabled for any reason other than pregnancy are still treated identically. Whether the disability or sickness is one that members of either sex could suffer, such as a broken leg, or hepatitis — or is one that members of only one sex could suffer — such as a ovarian cyst or prostatitis — the MMLA still permits plaintiff to treat workers under its leave policy with equal severity. The MMLA merely makes it illegal for an employer such as plaintiff [Miller-Wohl] '. . . to burden female employees in such a way as to deprive them of employment opportunities because of their different role.' National Gas Company v. Satty, 434 U.S. 142, 98 S.Ct. 347, 351, 54 L.Ed.2d 356 (1977)." Miller-Wohl v. Commissioner of Labor and Industry, etc., (1981), 515 F.Supp. 1264, 1266.

In 27 A.L.R. Fed. 537, 554, § 3[b] are annotations of cases before the Equal Employment Opportunity Commission relating to employers' policies of granting maternity leave only to employees who have been employed for a particular length of time. The EEOC finds such a policy to be discriminatory under Title VII. The reasons given include the fact that such maternity leave policies have a foreseeable adverse effect on the terms and conditions of female employment, without an equivalent effect upon similarly placed males. In the absence of a legitimate business necessity reason for such a policy, the EEOC takes official

notice of the fact that pregnancy, being a natural, expectable, and societally necessary condition, is certain to occur in a statistically predictable number of females in the labor force. Thus, an employment policy of not providing any leaves of absence, although neutral on its face, has an exclusive impact upon female workers in violation of Title VII.

Again, the holding in Abraham v. Graphic Arts International Union, supra, supports our conclusion with respect to the effect of Title VII, where inadequate leave is provided. The United States Supreme Court case of *Newport News Shipbuilding And Dry Dock Company v. EEOC*, supra, which finds that Title VII mandates equal treatment between male and female employees is in our opinion consonant with what we state here respecting Title VII and the implications of the MMLA respecting Title VII.

For the same reasons, we find that the MMLA is not preempted by either Title VII or the PDA. MMLA is consistent with the federal acts, and they permit state action in the same field. Section 42 U.S.C. 2000h-4; 2000e-7, supra.

VII.

As we noted above, a brief submitted by one set of amici suggested that the MMLA is invalid as being protectionist and paternalistic, but that its invalidity could be saved if this Court would extend the benefits of the MMLA on a gender-neutral basis to all workers.

Although we have found that the MMLA is not violative of federal law, there are, nevertheless, good reasons existing why the Court or legislature should consider extension of the same benefits.

In Welsh v. United States (1970), 398 U.S. 333, 361, 370, 90 S.Ct. 1792, 1810, 26 L.Ed.2d 308, (Harlan, J., concurring), Justice Harlan suggested a test for determining whether extension or invalidation was appropriate:

> "[i]t is . . . necessary to measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." 398 U.S. at 365.

Extension of the reasonable leaves afforded by the MMLA to all workers would indeed further the State's general interest in promoting the health and welfare of all its citizens and the legislature's concern for sexual equality and stable and workable family relationships. It would establish the goal of sexual equality in the work place contemplated by the MMLA and eliminate hostility and resentment toward pregnant workers from those who are denied reasonable disability leaves.

A policy which provided for disability leave without pay for all employees would cause the employer no financial disruption and little administrative expense.

More important to this case, however, extension of such MMLA benefits to all workers would end any argument that the MMLA is indeed sex based discrimination in violation of Title VII. In Hays v. Potlatch Forests (U.S.C.A. 8 1972), 465 F.2d 1081, the Court of Appeals sustained a District Court which had before it an employer-challenge to an Arkansas law requiring overtime pay for women but not for men. The Court of Appeals approved the District Court's order to eliminate discrimination by requiring that the male employees be paid an equal amount for overtime as required for women, finding thereby no frustration or impedance of the purposes of Title VII. The same rationale applies here.

The legislature will be meeting shortly after the time of this decision. It can take up the question of extending such benefits, in order to save the purposes of the MMLA free from any doubt. We defer extension to the consideration of the legislature. We heartily recommend consideration of such language by the legislature.

VIII.

In accordance herewith, the judgment of the District Court declaring MMLA invalid is hereby reversed; the order of the Commission awarding back pay and penalties to Tamara Buley is reinstated; this cause is remanded to the District Court for such further proceedings as may be necessary in accordance with this opinion, and with directions to remand to the Commission.

/s/ John C. Sheehy
Justice

We Concur:

/s/ Frank I. Haswell
Chief Justice

/s/ John Conway Harrison

/s/ L. C. Gulbrandson

/s/ Fred J. Weber

/s/ Daniel J. Shea

/s/ Frank B. Morrison, Jr.
Justices

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

THE MILLER-WOHL COMPANY, INC.,	)	
Petitioner,	)	
vs.	)	CAUSE NO. CDV-80-1096
COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, AND TAMARA L. BULEY,	)	ORDER
Respondents.	)	

On June 3, 1983, a hearing was held on the Petition for Judicial Review filed herein by Miller-Wohl Company and on the Motion for Judgment filed herein by the Commissioner of Labor and Industry.

Appearances at the hearing were as follows: Paul J. Van Tricht, attorney for the Commissioner; Richard Buley, attorney for Tamara L. Buley; Charles L. Fine and Cresap S. McCracken, co-counsel for Miller-Wohl Company.

Oral argument was presented by all counsel. Post-hearing Briefs were ordered and filed by counsel.

MEMORANDUM DECISION

The facts which give use to this litigation are recited in the Commissioner's Findings, Conclusions and Order, and in the various Briefs and exhibits attached thereto filed herein.

Suffice it to say, Tamara L. Buley was employed by Miller-Wohl in its Great Falls store for about three weeks

when she was terminated by her employer because of temporary disability (illness) caused by her pregnancy. She was not granted a sick leave or an unpaid leave of absence because of the employment policy of her employer which prohibited sick leaves and leaves of absence to employees of less than one year seniority. Tamara was terminated because she was not performing her job satisfactorily caused by her pregnancy related sickness.

Tamara filed a Complaint with the Commissioner of Labor and Industry and, after a hearing thereon, the Hearing Officer prepared his Findings, Conclusions and Order. In summary, the Hearing Officer found that Miller-Wohl had violated the Montana Maternity Leave Act in terminating Tamara, ordered Tamara to be re-hired, ordered calculated back wages to be paid together with a 100% penalty.

Miller-Wohl Company then timely filed its Petition for Judicial Review. The Commissioner subsequently filed his Motion for a judgment to enforce the earlier Order of the Commissioner.

Miller-Wohl asks that this Court reverse the Order of the Commissioner on the law. The argument is that the Maternity Leave Act is unconstitutional and/or pre-empted by federal law; more specifically that the state law prefers non-disabled pregnant females to the discrimination of disabled non-pregnant females and disabled males. Hence, Tamara's rights arise from an invalid law and are therefore non-existent.

Miller-Wohl also argues that even if Tamara's employment was unlawfully terminated because it was based on a termination due to a temporary disability caused by her pregnancy, she was only entitled to an unpaid leave of absence during her pregnancy and Miller-Wohl offered to reinstate her a month before she gave birth and she refused re-instatement, hence no unpaid wages are due to her.

Upon a review of the Transcript herein, and a consideration of the Briefs and oral arguments presented

herein, this Court concludes that the Hearing officer erred on the law herein and his Order should be reversed. This Court concludes that the Maternity Leave Act is discriminatory, is a denial of equal protection of the law, is a protective and preferential statute favoring non-disabled pregnant employees to the discrimination of disabled/non pregnant employees and disabled male employees, and is pre-empted by Titles VII and XI of the federal Civil Rights Act. Specifically this Court rules that the Commissioner's Order should be reversed because it is in violation of constitutional and statutory provisions. See Section 2-4-704 (2)(a) MCA relating to standards of review.

It was argued therein that this Court should give consideration and in fact should follow the reasoning of the U. S. District Court in its opinion which granted a Summary Judgment to the Commissioner in a Declaratory Judgment action filed by Miller-Wohl after Tamara had filed her Complaint with the Commissioner but before the Hearing Officer held his hearing thereon. However, the U. S. District Court's judgment was appealed to the U. S. Circuit Court of Appeals for the Ninth Circuit and vacated there because the appellate court ruled the U. S. District Court had no jurisdiction over the subject matter. Consequently this Court is not bound by the law set forth in the U. S. District Court's opinion.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Order of the Hearing Officer is reversed.

IT IS FURTHER ORDERED that the Commissioner's Motion for Judgment is denied.

DATED this 7th day of February, 1984.

/s/ Joel F. Roth

DISTRICT JUDGE

cc: Charles L. Fine
Cresap S. McCracken
Paul J. Van Tricht
Richard Buley

DEPARTMENT OF LABOR AND INDUSTRY
LABOR STANDARDS DIVISION

Thomas L. Judge, Governor — State Capitol

STATE OF MONTANA

(406)449-5600 — Helena, Montana 59601

BEFORE THE COMMISSIONER OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of Tamara L. Buley Complainant vs. Miller-Wohl Company, Inc. d/b/a Three Sisters Respondent	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND ORDER

I. INTRODUCTION:

On August 6, 1980 the Commissioner of Labor and Industry, State of Montana received a complaint from Tamara L. Buley of Great Falls, Montana. Mrs. Buley alleged a violation of the Montana Maternity Leave Act (Section 39-7-201 et seq. MCA) by her former employer, Miller-Wohl Company, Inc. Miller-Wohl Company, Inc. does business as Three Sisters, a clothing store, which is located in the Holiday Village Mall, Great Falls, Montana.

Subsequent to service of the Notice of Complaint and Hearing, Miller-Wohl Company, Inc. filed a Declaratory

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[*Typographical errors appear in the original text.]

restraining order on September 9, 1980. That order enjoined the Commissioner and his hearing examiner from holding a hearing on this complaint. The restraining order expired on September 22, 1980.

A hearing was held on this complaint on October 1, 1980 in Great Falls, Montana before Paul J. Van Tricht, hearing officer for the Labor Commissioner. Miller-Wohl Company, Inc. was represented by Charles Fine, Attorney at Law. Tamara L. Buley was represented by Richard Buley, legal intern for Tipp, Hoven and Skjelset.

Notice is taken of the Respondent's legal positions in the above cited pending United States District Court action.

II. FINDINGS OF FACT

1. Tamara L. Buley was an employee of Miller-Wohl Company, Inc. Miller-Wohl Company, Inc. operates a clothing store, Three Sisters, in the Holiday Village Mall in Great Falls, Montana. Mrs. Buley began her employment at Three Sisters on about August 1, 1979. She was a salesperson.

2. Miller-Wohl Company, Inc. owned about four stores in Montana and about 280 stores in the United States. Miller-Wohl Company, Inc. was engaged in interstate commerce during the period in contention.

3. Tamara L. Buley was paid $2.90 per hour, the federal minimum wage. As a salesperson she waited on customers, stocked merchandise, cleaned, etc.

4. Mrs. Buley determined she was pregnant about August 14, 1979. Shortly before August 14, 1979 she began to experience "morning sickness", e.g., temporary nausea, dizziness, etc. Mrs. Buley experienced "morning sickness" on a number of occasions while at work. She was "sent home" several times because of "morning sickness." The management of the store knew that Mrs. Buley was pregnant and knew that her illness was because of her pregnancy. On August 27, 1979 Mrs. Buley's employment with

Three Sisters was terminated by Judy Zeman, the store manager.

Mrs. Buley was terminated because she was unable to adequately perform her duties; she was unable to adequately perform her duties because she had "morning sickness." Mrs. Buley had "morning sickness" because she was pregnant. Mrs. Buley was ill, temporarily disabled, because of pregnancy and was terminated because of her temporary disability — her pregnancy.

Therefore I find that Miller-Wohl Company, Inc. violated Section 39-7-203(1) MCA by terminating Tamara L. Buley's employment because of her pregnancy.

5. The "Employees Guide," the employment policy, of the Miller-Wohl Company, Inc. (Exhibit A) does not allow for any leave of absence for employees with less than one year's service. Following that policy, Miller-Wohl Company, Inc. did not offer or grant Tamara Buley a leave of absence during her illness which was the result of her pregnancy.

Therefore, I find Miller-Wohl Company, Inc. violated Section 39-7-203(2) MCA by not granting Tamara L. Buley a reasonable leave for a temporary disability which resulted from her pregnancy.

6. Mrs. Buley gave birth on about April 4, 1980.

7. In March, 1980 Miller-Wohl Company, Inc. offered to re-employ Tamara L. Buley. Mrs. Buley declined that offer because Miller-Wohl Company, Inc. offered it as a complete settlement of this matter.

8. Mrs. Buley was not hired to work a regular 40 hour work week. Her work week was to fluctuated according to the seasonal retail business of Three Sisters. During the back to school season, August, and the Christmas season, Thanksgiving to January 1, 1980, Mrs. Buley was to work a 34 to 40 hour workweek.

During the remainder of the year she was to work a 16 to 20 hour workweek.

From about August 27 to November 22, 1979 Mrs. Buley could have worked approximately 252 hours.

252 hours x $2.90/hour $730.80

From November 22, 1979 to January 1, 1980 Mrs. Buley could have worked approximately 240 hours.

240 hours x $2.90/hour $696.00

From January 1, 1980 to March 1, 1980 Mrs. Buley could have worked approximately 180 hours.

180 hours x $3.10/hour $558.00

(Note: The federal minimum wage increased to $3.10/hour on January 1, 1980.)

From March 1, 1980 to August 1, 1980 Mrs. Buley could have worked about 260 hours allowing for her delivery and recovery from the birth.

260 hours x $3.10/hour $806.00

From August 1, 1980 to September, 1980 Mrs. Buley could have worked about 160 hours.

160 hours x $3.10/hour $496.00

Mrs. Buley sought to mitigate her damages by seeking other similar work in the Great Falls area. She was unsuccessful.

The approximately $3,286.80 in wages has been due and owing Tamara L. Buley by Miller-Wohl Company, Inc. over twenty days exclusive of Sundays and legal holidays. Therefore, Miller-Wohl Company, Inc. owes Tamara L. Buley a penalty of $3,286.80 pursuant to Section 39-3-206 MCA.

9. Miller-Wohl Company, Inc. was not shown to be guilty of oppression, fraud or malice.

III. CONCLUSIONS OF LAW

1. The Commissioner of Labor and Industry, State of Montana has jurisdiction over this complaint under the Montana Maternity Leave Act (Section 39-7-201 et. seq.

MCA). Specifically, Section 39-7-205 MCA provides: "A person claiming to be aggrieved by a violation of 39-7-203 or 39-7-204 may make, sign, and file a verified complaint with the commissioner, which shall state the circumstances of the violation and the particulars thereof and shall contain such other information as may be required by the commissioner." Section 39-7-206(1) MCA gives the commissioner the power to investigate complaints. Section 39-7-206(2) and 207 MCA gives the commissioner or his authorized representative, authority to hold a hearing to determine the validity of the complaint.

The commissioner or his authorized representative, also has authority to hear this complaint under Section 39-3-211 MCA. That section authorizes the commissioner to "take an assignment of [a wage] claim in trust for such employee and . . . maintain any proceeding appropriate to enforce the claim, *including liquidated damages pursuant to this [act].* (Emphasis supplied.) "This section is compatible with holding a hearing . . . *"Burgess v. Softich,* M , 535 P2d 178 (1975).

Further, Section 39-1-102 & 103 MCA provide:

> *"The Department of Labor and Industry shall be charged with the duty of enforcing all the laws of Montana relating to hours of labor, conditions of labor, prosecution of employers who default in payment of wages,* protection of employees, all laws relating to child labor regulating the employment of children in any manner, and to administer the laws of the state relating to free employment offices, and *all state labor laws enacted by legislation.*
>
> (1) in discharging the duties imposed upon the Department of Labor and Industry, *the Commissioner of Labor and Industry or his authorized representatives may administer oaths, examine witnesses under oath, take depositions or cause same to be taken,* deputize any citizen 18 years of age or older to serve

subpoenas upon witnesses, and *issue subpoenas for the attendance of witnesses before him in the same manner as for attendance before district courts.*" (Emphasis supplied)

Section 39-3-209 MCA provides:

"*It shall be the duty of the Commissioner of Labor* to inquire diligently for any violations of this part and *to institute actions for the collection of unpaid wages for the penalties provided for herein in such cases as he may deem proper and to enforce generally — the provisions of this part.*

Section 39-3-210 MCA provides:

(1) The Commissioner or his authorized representatives are empowered to enter and inspect such places, question such employees, and investigate such facts, conditions, or matters as they may deem appropriate to determine whether any person has violated any provision of this (act) or any rule issued hereunder or which may aid in the enforcement of the provisions of this (part).

(2) The Commissioner or his authorized representative shall have power to administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and testimony; and take depositions and affidavits in *any proceeding before the Commissioner.*"

Clearly under Section 39-1-102 & 103 MCA together with Section 39-3-201 et. seq. MCA, the Commissioner of Labor and Industry "or his authorized representatives" have the power to institute "any proceeding before the Commissioner," i.e., an administrative hearing, to enforce the provisions of the Wage Payment Act or any law relating to employment apart from a wage assignment under Section

39-3-211 MCA. That is, the Commissioner may institute a proceeding, an administrative hearing, which involves the Wage Payment Act without a wage assignment.

Section 39-3-201 MCA (Section 41-1301 R.C.M. 1947) states: " 'Wages' includes *any money due an employee from the employer* or employers, whether to be paid by the hour, day, week, semi-monthly, monthly, or yearly and shall include bonus, piecework, tips, and gratuities *of any kind.*" (Emphasis supplied.)

The Commissioner of Labor and Industry, State of Montana has clear jurisdiction over the complaint under the statutes and cases cited herein above.

2. At the hearing Respondent moved to disqualify the hearing examiner because he represented himself and the Commissioner of Labor and Industry in the action which was brought in the United States District Court by the Respondent against the hearing officer and the Commissioner. That action was to enjoin the hearing officer and Labor Commissioner from holding this very hearing.

The Commissioner's response to that action was purposefully limited to "procedural issues."

Section 2-4-611 (4) MCA provides:

> On the filing by a party, hearing examiner, or agency member in good faith of a timely and sufficient affidavit of personal bias, lack of independence, disqualification by law, or other disqualification of a hearing examiner or agency member, the agency shall determine the matter as a part of the record and decision in the case. The agency may disqualify the hearing examiner or agency member and request another hearing examiner pursuant to subsection (2) or assign another hearing examiner from within the agency. The affidavit must state the facts and the reasons *for the belief that the hearing examiner should be disqualified* and must be filed *not*

less than 10 days before the original date set for the hearing.

Therefore, the respondent's motion is denied because it was not timely filed and because the facts and reasons which are set forth in the affidavit do not constitute "personal bias, disqualification by law or other disqualification" of the hearing examiner. See Davis Administration Law 3rd Ed § 12.01 et seq.

3. At the hearing the Respondent argued that the Commissioner of Labor and Industry did not have the authority to delegate his authority under Section 39-7-201 et seq. MCA to the hearing examiner. First, the State Maternity Leave Act provides:

> 39-7-206. Investigative powers of Commissioner.
> (1) The commissioner *or his authorized representatives* may enter and inspect such places, question such employees, and investigate such facts, conditions, or matters as they consider appropriate to determine whether any person has violated any provision of this part or any regulation issued hereunder or which may aid in the enforcement of the provisions of this part.
>
> (2) The Commissioner *or his authorized representatives* may administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and testimony, and take depositions and affidavits in any proceeding before the commissioner.
>
> 39-7-207. Findings of fact and decision on complaint.
>
> (1) Within 60 days of the receipt of a complaint, the commissioner shall state his findings of fact and decision.

> (2) If, upon all the evidence, the commissioner finds that a respondent has engaged in a violation of 39-7-203 or 39-7-204, he shall state his findings of fact and shall order the respondent to reinstate the complainant if she so desires and to pay to the complainant the damages resulting from the violation.
>
> (3) If, upon all the evidence, the commissioner finds that the respondent has not engaged in a violation of 39-7-203 or 39-7-204, he shall state his findings of fact and shall dismiss the complaint. (Emphasis supplied.)

Therefore, the Montana Maternity Leave Act specifically provides for delegation of the Commissioner's authority to an "authorized representative." Also See 2-4-621(4) MCA. It is implicit in the Montana Administrative Procedures Act and Montana Maternity Leave Act that term, "the Commissioner," refers to the institution of "the Commissioner" rather than the particular individual who currently is the Commissioner, i.e., David E. Fuller. Sound principles of organization requires that the Commissioner of labor concentrate his attention upon the larger and more important questions of policy and practice of an organization which includes the Employment Security Division, the Workers' Compensation Division, the Employment and Training Division, the Board of Personnel Appeals, the Labor Standards Division, etc. In the 1979 fiscal year the Labor Standards Division alone held approximately 170 contested, adversary proceedings; it received over 1200 formal individual complaints under the various laws which the "Commissioner" has delegated to the Labor Standards Division. Further, the "Commissioner" is engaged in extensive litigation.

To require the Commissioner to pass personally upon each action or even a fraction of these actions would be "absurd." *Wirtz v. Atlantic States Construction Co.* 357 F.2d

422 (5th Cir. 1966); *Jay v. Boyd,* 351 U.S. 345, 357, 76 S. Ct. 919, 923, 100 L.Ed 1242 (1956). "It is manifestly necessary that he delegate duties of this sort to subordinate officials." *United States v. Cottman Co.,* 190 F.2d 805, 807 (4th Cir. 1951). See Davis Admin. Law 3rd Ed. Chapter 9.

4. Tamara L. Buley was an employee of Miller-Wohl Company, Inc. d/b/a Three Sisters and Miller-Wohl Company, Inc. d/b/a Three Sisters was an employer of Tamara L. Buley as those terms are defined in the Montana Maternity Leave Act (39-7-201 MCA) and the Montana Wage Payment Act (Section 39-3-201 et seq. MCA).

5. Miller-Wohl Company, Inc. d/b/a Three Sisters is subject to the provisions of the Montana Maternity Leave Act (Section 39-3-201 et seq. MCA). It also is subject to the provisions of the Fair Labor Standards Act.

Tamara L. Buley, a female, is a member of the "class" which is protected by the Montana Maternity Leave Act and the Montana Wage Payment Act.

6. A hearing which is held under the Montana Maternity Leave Act and/or the Montana Wage Payment Act is held in accordance with the Montana Administrative Procedures Act (Section 2-4-101 et seq. MCA). That act provides "a final decision shall include Findings of Fact and Conclusions of Law, separately stated" and "each conclusion of law shall be supported by authority or by a reasoned opinion." The Montana Administrative Procedures Act does not contain an expressed or implied provision which prevents the Commissioner from ruling on federal questions or constitutional questions within the very narrow frame of the statutory "quasijudicial" power which is delegated to him by the Montana legislature. See Mtn States Tel and Tel v. Commissioner, P2d , 36 St. Rep. 1844 (1979).

7. Under the Montana Administrative Procedures Act, the burden of proof is on the claimant to prove her claim by the reliable, probative and substantial evidence based on the whole record.

The burden of proof is defined as the obligation imposed upon a claimant in making her claim and upon a defendant in asserting affirmative defenses and counterclaims, to persuade the trier of the facts by the reliable, probative, and substantial evidence of the truth of what each has affirmatively asserted in his pleading. Although the duty of going forward with the evidence (for instance, when a defendant satisfactorily meets the prima facie case of a plaintiff and the plaintiff must submit more proof to overcome the defense of the defendant) may shift several times during the course of a hearing, if the evidence is evenly balanced the verdict must be against the party who has the burden of proof, because she has failed to prove her case by reliable, probative, and substantial evidence.

When the party who has the burden of proof has produced sufficient evidence to be entitled to a judgment in her favor, a prima facie case has been made out. When the other side presents his evidence, he may overcome the prima facie case. This calls for going forward with evidence in rebuttal.

8. The case law developed under various federal and state civil rights statutes must be applied with caution to the Montana Maternity Leave Act since that act requires far more than nondiscriminatory conduct by an employer; however, that case law does provide guidance in analysis of the instant case.

9. The Montana Maternity Leave Act states:

It shall be unlawful for an employer or his agent to:

(1) *terminate a woman's employment because of her pregnancy;*

(2) *refuse to grant to the employee a reasonable leave of absence for such pregnancy;*

(3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits

accrued pursuant to p' ..ns maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties;

(4) retaliate against any employee who files a complaint with the commissioner under the provisions of this part; or

(5) require that an employee take a mandatory maternity leave for an unreasonable length of time. (Emphasis supplied.) The Rules of the Commissioner provide:

24.14.301 TERMINATION OF EMPLOYMENT DUE TO PREGNANCY PROHIBITED. Section 39-7-203(1), MCA, provides that it shall be unlawful for an employer or his agent to terminate a woman's employment because of her pregnancy. In applying this section, the Commissioner shall consider "terminations" to include all involuntary dismissals, all resignations in which the employee's resignation was required by the employer or permitted as the sole alternative to dismissal and those situations in which the totality of the circumstances surrounding a resignation by an employee indicate that the resignation was compelled by the conduct or policy of the employer or agent. Coercive conduct by an employer or his agent toward an employee in order to secure her resignation, when the employee's pregnancy constitutes a substantial reason for the conduct, shall be considered a violation of section 39-7-203(1), MCA.

24.14.302 RIGHT TO REASONABLE LEAVE OF ABSENCE. Section 39-7-203(2), MCA provides that it shall be unlawful for an employer or his agent to refuse to grant to the employee a reasonable leave of absence for pregnancy. In determining the standards which shall apply to a request for a leave of absence for pregnancy, an employer shall apply standards *at least as inclusive* as those which he applies to requests for leave of absence for any other valid medical reason.

24.14.304 PREGNANCY-RELATED DISABILITIES TO BE TREATED AS TEMPORARY DISABILITIES. Disabilities as a result of pregnancy, are, for all job-related purposes, temporary disabilities and *shall not be treated less favorably* than other temporary disabilities under any health, medical, or temporary disability insurance plan or sick leave plan maintained by employer. The question of maintenance is one of fact which will be judged upon all of the evidence. No written or unwritten employment policies or practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement or payment under any health, medical, or temporary disability insurance plan, or under any sick leave, disability leave or disability benefit plan whatsoever, whether formal or informal, shall be applied to disability due to pregnancy, *on terms or conditions less favorable than those applied to other temporary disabilities.* (Emphasis supplied.)

These emphasised terms do not, in any way, limit the requirements of the Montana Maternity Leave Act. The fact that the respondent applies its employment policies uniformly does not negate the fact that those policies violate the Montana Maternity Leave Act.

Section 39-7-201 et seq. MCA is in derogation of the common law principle that an employer may terminate any employee for any reason, or no reason, however, Section 1-2-103 MCA provides: "The rule of the common law that statutes in derogation thereof are to be strictly construed has *no application* to the codes or other statutes of the State of Montana. The codes and *their provisions* and all proceedings under them *are to be liberally continued* with a view to effect their objects and to promote justice." (Emphasis Supplied).

Therefore, the Montana Maternity Leave Act must be liberally construed.

The phrase "to terminate a woman's employment because of her pregnancy" is clear in and of itself; and when read in conjunction with paragraphs (2), (3) and (5) the phrase is capable of no other construction than that an employer cannot terminate an employee because of temporary illness associated with her pregnancy, e.g. morning sickness.

The reliable, probative and substantial evidence showed that Tamara L. Buley was terminated by Miller-Wohl Company, Inc. principally because of absence which was associated with morning sickness and therefore was terminated because of her pregnancy within the meaning of Section 39-7-203(1) MCA.

Further, Miller-Wohl Company, Inc. did not allow Mrs. Buley to take a leave of absence during her periods of temporary disability and therefore, it violated Section 39-7-203(2)MCA.

10. The respondent contends that the Montana Maternity Leave Act creates greater rights for pregnant employees (females) than are enjoyed by other disabled employees (males) and therefore violates the 1964 Civil Rights Act, the 14th Amendment to the U.S. Constitution and 42 USC 1983 and 1988, i.e., it "discriminates" against men because men do not get pregnant and therefore, do not benefit from the Montana Maternity Leave Act.

In *Delta Air Lines v. Kramorsky,* 21 FEP Cases 1429 (January 28, 1980) the United States District Court for the Southern District of New York citing *General Electric Co.v. Gilbert,* 429 U.S. 125 ruled on similar constitutional objects to provisions of the New York Disability Benefit Law. (DBL)

In that case the federal District Court held:

> The Supreme Court has never adopted the view that an employment practice is illegal simply because it benefits members of one sex more than members of the other. Title VII forbids discrimination on the basis of "gender

as such" — that is, it forbids an employer from dividing employees into two classes, the class of male employees and class of female employees, and treating those two classes differently with respect to "compensation, terms, conditions, or privileges of employment" (unless the employer can establish that in the circumstances sex is a "bona fide occupational qualification"). 42 U.S.C. 2000c-2. Title VII does not forbid an employer from dividing employees into classes on the basis of some other factor, and treating those classes differently, even though the different treatment may fall more heavily on the members of one sex than on members of the other, unless the employer's practice is a pretext designed to effect an invidious discrimination against members of one sex or the other. This is so even though the Court has recognized that in some circumstances a showing of "disproportionate impact" creates a presumption of invalidity that the employer must rebut by demonstrating that the classification involved serves a legitimate function. See *Gilbert,* supra, 429 U.S. at 136-37, 13 FEP Cases at 1662; Washington v. Davis 426 U.S. 229, 246, 47, 12 FEP Cases 1415, 1422 (1976); *Griggs v. Duke Power Co.* 401 U.S. 424, 432, 3 FEP Cases 175, 178 (1971).

Properly characterized the [respondent's] argument is one of disproportionate impact. They note that providing coverage for pregnancy related disabilities benefits some women but no men, and argue that this is to discriminate between men and women on the basis of sex. But in *Gilbert,* supra, the Supreme Court rejected just this sort of analysis. In holding that an employer's failure to provide coverage for pregnancy related disabilities was not discrimination "based on sex", the Court, quoting from its earlier opinion in

Geduldig v. Ajello, 417 U.S. 484, 8 FEP Cases 97 (1974) (rejecting a constitutional challenge to a state employee benefits plan that did not include such coverage), stated: "While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex based classification . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, lawmakers are *constitutionally free to include* or exclude *pregnancy* from the *coverage* of legislation such as this on any reasonable basis, just as with respect to any other physical condtion." 429 U.S. at 134-35, 13 FEP Cases at 1661 (quoting 417 U.S. at 496 n.20 8 FEP Cases at 101)(emphasis added).

The real distinction involved here, as described in *Gilbert* and *Geduldig*, is not that between women and men, but that between pregnant women and nonpregnant persons. It is quite true that the amendments to the DBL benefit "pregnant women" at the expense of "nonpregnant persons" (including many female employees), and it could be argued that this distribution of benefits is unfair to "nonpregnant persons." It is equally true that the amendments benefit women as a class at the expense of men as a class, and it could be argued that this distribution of benefits is unfair to men. But "the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address." *City of Los Angeles Department of Water and Power v. Manhart,* 435 U.S. 702, 709, 17 FEP Cases 395, 399 (1978). The New York legislature has addressed that question and determined that whatever class inequities may be involved in

ensuring coverage for pregnancy related disabilities in employee benefit plans are warranted by the social benefits of such coverage.

'The invalidity of the [respondent's] analysis is confirmed by the decision of the Supreme Court in City of *Los Angeles Department of Water and Power v. Manhart*, supra, 435 U.S. 702, 17 FEP Cases 395 (1978), which invalidated the Los Angeles Department of Water and Power's requirement that its female employees make larger contributions to its pension fund than its male employees during the term of their employment, to make up for the fact that women as a class live longer than men, and consequently collect more pension benefits than men following retirement. The Department argued that not to require larger contributions from its female employees would violate Title VII because it would require male employees to subsidize the pension benefits of female employees just as the respondents argue here that not to exclude coverage for pregnancy related disabilities would violate Title VII because it would require male employees to subsidize the disability benefits of female employees (though, as indicated above, the actual effect would be to require male employees and female employees who do not become pregnant to subsidize the benefits of those female employees who do become pregnant). However, in *Manhart* the Court rejected the claim that practices that have a "disproportionately heavy impact on male employees" are illegal per se, noting that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another." 435 U.S. at 170 n.20, 17 FEP Cases at 400 (emphasis in original).

> *Manhart* emphasized that Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . [T]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." Id. at 708-09, 17 FEP Cases at 399.
>
> The fundamental flaw of the [respondent's] argument that to provide coverage for pregnancy related disabilities would be to discriminate against men is that it focuses on fairness to classes rather than fairness to individuals.

Under the Federal District Court's "Gilbert" analogy the Montana Maternity Leave Act is clearly constitutional and is not in violation of Title VII. However, it is not necessary to rest the Montana Leave Act on an analysis such as that provided in *Delta Airlines*.

Alternately, since the Montana Maternity Leave Act results in unequal treatment of females and males, it might be suspect under the Equal Protection Clause as reflecting a gender based discrimination. Although it could be argued as in *Delta Airlines* that the Act creates two non-gender classes — "pregnant women and non-pregnant persons," the classification system, the Act, could be considered to separate employees into male who cannot become pregnant and female who can become pregnant. Under that premise the Montana Maternity Leave Act is a law which inherently classifies upon gender since this act grants pregnant women different employment rights than those rights which are enjoyed by males.

In *Personnel Administration Sector of Mass v. Feeney*, U.S. , 19 FEP Cases 1377 (1979), the United States Supreme Court stated:

> The Equal Protection Guarantee of the Fourteenth Amendment does not take from the

States all power of classification. *Massachusetts Bd. of Retirement v. Murgia* 427 U.S. 307, 314, 12 FEP Cases 1569, 1572. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. *New York Transit Authority v. Beazer,* U.S. 19 FEP Cases 149; Jefferson v. Hackney, 406 U.S. 535, 548 Cf. *James v. Valtierra,* 402 U.S. 137. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility. *Dandridge v. Williams,* 397 U.S. 471; *San Antonio Bd. of Education v. Rodriguez,* 411 U.S. 1. In assessing an equal protection challenge a court is called upon only to measure the basic validity of the legislative classification. *Barrett v. Indiana,* 229 U.S. 26, 29 30; *Railway Express Co. v. New York;* 336 U.S. 106. When some other independent right is not at stake, see e.g., *Shapiro v. Thompson,* 394 U.S. 618, and when there is no reason to infer antipathy *Vance v. Bradley,* U.S. , 19 FEP Cases 1, it is presumed that even improvident decisions will eventually be rectified by the democratic process. . . . Ibid.

Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination. *Caban v. Muhammed,* U.S. (dissenting opinion). This court's recent cases teach that such classifications must bear a close and substantial relationship to important governmental objectives. *Craig v. Boren,* 429 U.S. 190, 197, and are in many settings unconstitutional, *Reed v. Reed,*

404 U.S. 71: *Frontiero v. Richardson,* 411 U.S. 677, 9 FEP Cases 1253: *Weinberger v. Wiesnfeld,* 420 U.S. 636: *Craig v. Boren,* supra: *Califano v. Goldfarb,* 430 U.S. 199:

Further, Justice Marshall stated in his dissenting opinion "To survive challenge under the Equal Protection Clause, statutes reflecting gender-based discrimination must be substantially related to achievement of important governmental objectives." See *Califano v. Webster,* 430 U.S. 313, 316-317 (1977); *Craig v. Boren* 429 U.S. 190, 197 (1976); *Reed v. Reed,* 404 U.S. 71, 76 (1971).

The Montana Maternity Leave Act, was an integral part of an effort by the Legislature of the State of Montana to implement Article II, Section 4, of the 1972 Constitution of the State of Montana Article II, Section 4 states:

> "*Individual Dignity.* The dignity of the human being is inviolable. *No person* shall be denied the equal protection of the laws. *Neither the State nor any* person, firm, *corporation,* or institution *shall discriminate against any person* in the exercise of his civil or political rights *on account of* race, color, *sex,* culture, social origin or conditions, or political or religious ideas." (Emphasis supplied.)

While the right to be free from sex discrimination in all its forms currently may not be recognized in the United States Constitution or by the United States Supreme Court as a fundamental right, that right is fully recognized as a fundamental right by the 1972 Montana Constitution. Any interpretation of the Montana Maternity Leave Act or address to the respondent's arguments must be based, in part, on the recognition of this fundamental right and the recognition that the Maternity Leave Act was an integral part of a comprehensive effort by the Legislature to enforce this fundamental right; a fundamental right guaranteed by Article II, Section 4 of the Montana Constitution which was ratified by the electorate of Montana in 1972. The Montana Constitution outlaws "discrimination;" it does not outlaw

different treatment. To treat people "equally" it is often necessary to treat people "differently."

Any legislation which deals in any way with pregnancy must by its very nature result in gender based classifications; the decision on how this legislation is to reverberate throughout Montana is a decision the Montana legislature has made in enacting the Montana Maternity Leave Act. The classification is rationally based on the laws of nature, i.e., biology. The legislation is rationally designed to implement Montana Constitution and accomplish a legislative goal, i.e., the affirmative policy of the State of Montana "to enable women to contribute to society according to their fullest possible potential" and to promote the family by lessening the economic burden of pregnancy." See Section 34-7-101 MCA. Therefore under the rationale used by the U.S. Supreme Court in *Personnel Adm. of Mass v. Feeney* the Montana Maternity Leave Act does not violate the United States Constitution or the Montana Constitution since the classification itself has a rational basis, a nondiscriminatory intent, and bears close relationship to important governmental objectives.

10. The Respondent argues Title VII of the 1964 Civil Rights Act preempts the Montana Maternity Leave Act. However, the 1964 Civil Rights Act provides:

> Title VII, Sec. 708,
>
> *"Nothing in this title shall be deemed to exempt or relieve any person from liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State,* other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." (Emphasis applied)
>
> Section 1104 of Title XI
>
> *"Nothing contained in any title of this Act shall be construed as indicating an intent on*

> *the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter,* nor shall any provisions of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of the Act or any provision thereof." (Emphasis applied)

The purpose of Congress is the ultimate touchstone in determining whether a state law is preempted by federal legislation. The 1964 Civil Rights Act does not evidence a clear intent to preempt state action. Indeed, it expressly authorizes such state action. Further the District Court in *Delta Airlines* found no federal preemption by the 1964 Civil Rights Act of "state protective legislation" similar to the Montana Maternity Leave Act.

Therefore, the Montana Maternity Leave Act is not preempted by the 1964 Civil Rights Act 42 USC 2000 et seq.

12. Once the claimant has proved a violation of the Montana Maternity Leave Act and established her entitlement to back pay, the burden shifted to the defendant to rebute the claim or to mitigate the liability, *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 10 FEP Cases 1249 (7th Cir. 1975); *N.L.R.B. v. Madison Courier, Inc.*, 472 F.2d 1307, 80 LRRM 3377 (D.C. Cir. 1973). The respondent must show that the complainant failed to earn amounts which she might have earned by reasonable diligence *Equal Employment Opportunity Commission v. Detroit Edison Co.* 515F.2d 301, 315, 19 FEP Cases 239 (6th Cir. 1975).

Again, where an employer violated the Montana Maternity Leave Act, the burden is on the respondent employer to show interim earnings or amounts earnable by the complainant with reasonable diligence. *Wegler v. Board of Education,* 447 F. 2d 1078, 1081, 3 FEP Cases 1212, 1213-1214 (8th Cir., 1971); *Rolfe v. County Board of Education,* 391 F. 2d 77, 81, 9 FEP Cases 1111, 1114 (6th Cir., 1968). The

complainant made an adequate showing that she used reasonable diligence to find other suitable, similar or substantially similar employment and the respondent failed to show she did not mitigate the damages.

13. Section 39-7-207(2) MCA states, "If, upon all the evidence, the Commissioner finds that a respondent has engaged in a violation of 39-7-203 or 39-7-204, he *shall state his findings of fact and shall order the respondent to reinstate the complainant* if she so desires and to pay to the complainant the *damages* resulting from the violation." (Emphasis supplied.)

Section 27-1-202 MCA states, "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." In any action for a breach of an obligation not arising from contract where the defendant has been "guilty of oppression, fraud, or malice, actual or presumed," damages in addition to the actual damages, may be given for the sake of example and by way of punishing the respondent. See Section 27-1-221 MCA. The respondent was not guilty of "oppression, fraud, or malice."

Section 39-3-206 NCA provides a penalty "shall" be assessed against any employer who fails to pay any of his employees. The penalty is a sum equivalent to the fixed amount of five percent of wages due and unpaid for each day, except Sundays and legal holidays, upon which such failure continues after the day upon which such wages were due, except that such failure shall not be deemed to continue more than 20 days after the date such wages were due. The word "shall" means SHALL. As used in statutes, contracts, or the like, this word is generally imperative or mandatory. See *U.S. v. Two Hundred and Sixty-Seven Twenty Dollar Gold Pieces* 255 F. 217, 218.

Section 39-3-204(1) MCA provides, "Every employer of labor in the State of Montana shall pay to each employee the wages earned by such employee in lawful money of the

United States or checks on banks convertible into cash on demand at the full face value thereof, and no person for whom labor has been performed may withhold from any employee any wages earned or unpaid for a longer period than ten business days after the same are due and payable," i.e., each pay day.

It is clear that the labor commissioner can assess the penalty as provided in Section 39-3-206 MCA since Section 39-3211 MCA gives the labor commissioner the right to assess "liquidated damages" i.e., penalty. See *State of Montana v. Holman Aviation Co.* 35 St. Rep. 285, P2d (1978).

Miller-Wohl Company, Inc. owes Tamara L. Buley $3,286.80 in wages and $3,286.80 in penalty pursuant to Section 39-3-206 MCA.

14. The Wage Payment Act (Section 39-3-201 et seq.) and the Maternity Leave Act (Section 39-7-201 et seq. MCA) do not grant the authority to the labor commissioner to award attorney's fees at an administrative hearing. However, see *Garsjo v. Department of Labor and Industry,* 562 P. 2d 473 (1977), where the District Court awarded attorney's fees to a claimant when the respondent filed a Petition for Judicial Review and lost that appeal.

Any finding of fact which is a conclusion of law is adopted as a conclusion of law: any conclusion of law which is a finding of fact is adopted as a finding of fact.

IV. ORDER

Miller-Wohl Company, Inc. is ordered to reinstate Tamara L. Buley to its employ and Miller-Wohl Company, Inc. is ordered to pay to Tamara L. Buley $6,573.60 of which $3,286.80 is back wages due Tamara L. Buley and $3,286.80 is penalty due Tamara L. Buley pursuant to Section 39-3-206 MCA together with such other and further wages and penalty which shall accrue to the claimant up to the date of rehire.

All motions of the parties which are not addressed herein above are denied.

This Order is FINAL to the Department of Labor and Industry, State of Montana and the Commissioner of Labor and Industry, State of Montana.

DATED this 3 day of October, 1980.

/s/ Paul Van Tricht

Paul Van Tricht, Hearing Officer
for the representative of the
Commissioner

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a Petition for Judicial Review with a District Court within thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701 et seq. MCA. A motion for rehearing does not toll this time period.

If no payment is made pursuant to this Order, the Commissioner of Labor will apply to the District Court for a judgement to enforce this Order pursuant to Section 39-3-212 MCA and Section 39-7-209 MCA. Such an application is not a review of the validity of this order.

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 3 day of October, 1980:

Tamara L. Buley
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Clerk of Court
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Great Falls, Montana
59401

/s/ Paul Van Tricht

SB9:g

(3)

No. 84-1545

Office-Supreme Court, U.S.
FILED
APR 26 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

The Miller-Wohl Company, Inc.,

Appellant,

v.

Commissioner of Labor and Industry,
State of Montana, and Tamara L. Buley,

Appellees

ON APPEAL FROM THE SUPREME COURT OF MONTANA

MOTION TO DISMISS

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April 24, 1985

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MOTION TO DISMISS

Appellees, Commissioner of Labor and Industry and the State of Montana, hereafter collectively referred to as the State, move this Court, pursuant to Supreme Court Rule 16.1, to dismiss the appeal of the Miller-Wohl Company, Inc., for the reasons stated herein.

———o———

JURISDICTION

Miller-Wohl relies on 28 USC 1257(2) to bring this appeal.

———o———

STATEMENT OF ISSUES

Miller-Wohl presents two issues in its appeal. Whether the Montana Maternity Leave Act (MMLA) violates the equal protection clause of the fourteenth amendment of the U.S. Constitution and whether the MMLA violates and is preempted by the Civil Rights Act of 1964, as amended.

———o———

GROUNDS FOR DISMISSAL

Miller-Wohl's appeal should be dismissed because:

1. The Montana Supreme Court did not pass on whether the MMLA violates the equal protection clause of the fourteenth amendment, and
2. Miller-Wohl bases its appeal on facts not in the record.

STATEMENT OF THE CASE

On or about August 6, 1980, Tamara L. Buley, hereafter Buley, filed a complaint with the Montana Department of Labor and Industry alleging that her ex-employer Miller-Wohl violated the Montana Maternity Leave Act, 39-7-201, et seq., MCA[1], by terminating her employment due to her pregnancy and by refusing to grant her a reasonable leave of absence for her pregnancy. After being served with a Notice of Complaint and Adminstratve Hearing, Miller-Wohl filed a Petition for Declaratory Judgment in the U.S. District Court for the District of Montana, Great Falls Division, asking the court to find the MMLA a violation of equal protection and preempted by Titles VII and XI of the Federal Civil Rights Act of 1964. A temporary restraining order was issued on September 9, 1980 enjoining the Commissioner and his hearings examiner from holding a hearing on Buley's complaint. The restraining order expired on September 22, 1980. An administrative hearing was held on the complaint on October 1, 1980 and a finding made that Miller-Wohl had violated the MMLA. The Commissioner awarded Buley backpay and statutory penalties.

On June 8, 1981 the Federal District Court issued its order (515 F.Supp. 1264 (D. Mont., 1981)) on Miller-Wohl's petition finding that the MMLA was constitutional and not preempted by the Civil Rights Act. This order was vacated by the U.S. Court of Appeals, 9th Circuit (685 F.2d 1088 (9c. 1982)) due to lack of federal subject matter jurisdiction.

---

[1]The MMLA has since been recodified at 49-2-310 and 311, MCA.

On June 3, 1983 the District Court of the Eighth Judical District of the State of Montana in and for the county of Cascade held oral arguments on Miller-Wohl's petition for judicial review of the Department's administrative order. On February 7, 1984 the state district court entered its order finding "that the MMLA is discriminatory, is a denial of equal protection of the law, is a protective and preferential statute favoring nondisabled pregnant employees to the discrimination of disabled nonpregnant employees and disabled male employees, it is preempted by Title VII and XI of the Federal Civil Rights Act."

The district court's order was appealed to the Montana Supreme Court by Buley and the State. On December 28, 1984 the Montana Supreme Court reversed the district court's order. The Montana Supreme Court's opinion concluded:

> "In accordance herewith, the judgment of the district court declaring MMLA invalid is hereby reversed: the order of the Commissioner awarding backpay and penalties to Tamara Buley is reinstated; this cause is remanded to the district court for such further proceedings as may be necessary in accordance with this opinion, and with directions to remand to the Commissioner."

Miller-Wohl filed a Notice of Appeal with the Montana Supreme Court on February 1, 1985. Its jurisdictional statement was filed with the U.S. Supreme Court on March 27, 1985 and served on the State on April 8, 1985.

———o———

STATEMENT OF THE FACTS

Miller-Wohl operates approximately 280 women's clothing stores nationwide, includng four stores in Montana. Buley was hired as a salesperson to work in Miller-Wohl's Three Sisters clothing store in Great Falls, Montana on or about August 1, 1979. Buley determined she was pregnant on or about August 14, 1979. Shortly before this date, she began to experience "morning sickness" consisting of temporary nausea and dizziness. Buley experienced morning sickness on a number of occasions while at work. She was sent home several times because of her illness. Miller-Wohl knew that Buley was pregnant and knew that her illness was due to her pregnancy. On August 27, 1979 Buley was terminated because she was unable to adequately perform her duties due to her illness which in turn was caused by her pregnancy. Buley gave birth on April 4, 1980.

———o———

SUPPORTING ARGUMENT

Miller-Wohl's Argument That The MMLA Violates The Equal Protection Clause Of The Fourteenth Amendment Of The U.S. Constitution Was Not Expressly Passed On By The Montana Supreme Court.

In its petition for judicial review filed with the state trial court, Miller-Wohl alleged that the MMLA violated both the United States and the Montana Constitutions. Montana's equal protection provision is found at article II, section 4 of its constitution. That section reads:

> "Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the State nor any person, firm, corporation or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, political or religious ideas."

In *Montana Human Rights Division v. City of Billings*, — Mont. —, 639 P2d 1283 (1982), the Montana Supreme Court held that this section creates a compelling state interest in eradicating discrimination. In Montana, a statute that classifies on the basis of sex will be subjected to strict scrutiny. In contrast, this Court held in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.ed. 2d 395 (1976) that:

> To withstand [federal] constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.
>
> 429 U.S. at 197

The trial court in the present case held simply that the MMLA "is a denial of equal protection of the law". In briefs and argument the State made clear to the Montana Supreme Court that the MMLA was being challenged pursuant to both the United States and the Montana Constitutions and that the state's constiution provided the tougher hurdle to overcome. In addition, the Montana Human Rights Commisison filed an Amicus Curiae brief on this specific issue.

In reversing the trial court's holding that the MMLA is invalid, the Montana Supreme Court found that the

MMLA was not a violation of equal protection. The Court does not state the basis for this finding. It must be presumed, however, that the Court considered and ruled on the Montana constitutional challenge and found that the MMLA met the strict scrutiny requirement of article II, section 4. The Montana Supreme Court is the final interpreter of Montana's constitution. Questions of Montana constitutional interpretation cannot be appealed to a higher authority. To interpret the Court's holding differently would leave important Montana constitutional issues unanswered. Supreme Court Rule 16.1(b) states:

> "The court will receive a motion to dismiss an appeal from a state court on the ground that . . . the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on."

To be reviewed by this Court, a federal question must not only be "raised" but must also be "passed on". The Montana Supreme Court's opinion in no way indicates that a federal question was "expressly passed on".

In *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S.Ct. 670, — L. Ed. — (1940) in discussing the so-called "not pressed or passed on" rule this court stated:

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to refute. Apart from the reluctance with which every court should proceed to

> set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this court to state court's requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this court, where the constitutionality of a statute has been upheld in a state court, consistently refuses to consider any grounds of attack not raised or decided in that court. 309 U.S. at 434.

In *State Farm Mutual Automobile Insurance Company v. Duel,* 324 U.S. 154, 65 S.Ct. 573, — L. Ed. — (1945) this Court held, more directly to the point, "since the [state] Supreme Court did not pass on the question, we may not do so." 324 U.S. at 160.

In *Illinois v. Gates,* — U.S. —, 103 S.Ct. 2317, — L. Ed. 2d — (1983), this court considered but did not decide whether the "not pressed or passed upon" rule was jurisdictional or prudential. The State submits that the rule is jurisdictional as evidenced by this Court's own Rule 16.1. In addition, the present case is one where the "appropriate relationship" of this Court to state courts referred to in *McGoldrick* should be recognized and Miller-Wohl's appeal dismissed.

Miller-Wohl's Argument That The MMLA Is Preempted By The Civil Rights Act Is Based On Facts Not In Evidence.

Miller-Wohl bases its argument that the MMLA violated Title VII on the notion that, unlike the Civil Rights Act, the MMLA does not consider a pregnant woman's ability or inability to work. Miller-Wohl argues that the MMLA requires an employer to grant a reasonable maternity leave irregardless of whether the pregnant worker is

disabled. This same issue was raised before the Montana Supreme Court which dismissed the argument finding:

> "We reject Miller-Wohl's arguments on these points. Miller-Wohl is arguing on a statement of facts that are not before this court, and were not before the district court nor the Commissioner. We are not considering in this case a nondisabled pregnant employee. Tamara Buley was disabled by virtue of her pregnancy, and eventually was discharged for that disability." 692 P.2d at 1253-4.

Miller-Wohl is limited to the facts in the record. The company cannot claim that the MMLA grants benefits to nondisabled pregnant workers that go beyond the scope of the Civil Rights Act since in this case Buley was disabled. An opinion by this Court on this issue would be advisory.

In addition, Miller-Wohl claims that the MMLA requires an employer to grant preferential treatment to pregnant women employees. Such preferential treatment, the company claims, discriminates against Miller-Wohl's male employees in violation of the Civil Rights Act. The record, however, indicates that Miller-Wohl had no male employees in Montana. With no male employees there can be no discrimination and again, an opinion by this Court on this issue would be advisory. Miller-Wohl claims the MMLA violates the Civil Rights Act and has the burden of presenting evidence to support this defense. Buley, the Manager and Assistant Manager of the Great Falls store, all witnesses at the administrative hearing, are women. Other store employees were consistently referred to by the store manager as "the girls", "the other girls", or "the rest of the girls".

CONCLUSION

Miller-Wohl claims that the issues it raises are substantial and that unless this Court takes this appeal employers nationwide will be uncertain as to whether Title VII allows and/or requires the granting of maternity leave.

Miller-Wohl's plea ignores existing case law on this subject. In *Abraham v. Graphic Arts International Union,* 660 F.2d 811 (D.C. Cir., 1981), the Court found that the granting of adequate maternity leave is required by Title VII. Recently, the U.S. Court of Appeals, 9th Circuit upheld a California law similar to the MMLA in *California Federal Savings and Loan Assoc. v. Guerra,* Nos., 84-84-5843, 84-5844, 9c. April 16, 1985. Two U.S. courts of appeals and the only state supreme court to have considered the issues raised by Miller-Wohl are all in agreement. Statutes like the MMLA, do not violate the Civil Rights Act of 1964. Miller-Wohl, apparently, is simply unwilling to recognize the established case law in this area.

Respectfully submitted,

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APPENDIX

Following are excerpts from the Administrative Transcript of the hearing held by the Commissioner pursuant to Buley's complaint against Miller-Wohl. The hearing was held on October 1, 1980 in Great Falls, Montana.

Page 47, Lines 10 through 23.

PAUL J. VAN TRICHT [Hearing Examiner]: Would you like to call the next witness.

CHARLES FINE: Yes. Judy Zeman.

JUDY ZEMAN: Okay.

PAUL J. VAN TRICHT: Do you swear the testimony you're about to give is the truth, the whole truth and nothing but the truth?

JUDY ZEMAN: Yes.

CHARLES FINE: Would you state your name for the record please.

JUDY ZEMAN: Judy Zeman.

CHARLES FINE: And would you spell your last name Judy.

JUDY ZEMAN: Z E M A N.

CHARLES FINE: You were employed by the Miller-Wohl Company as the store manager of the Great Falls Three Sisters store. Is that correct?

JUDY ZEMAN: Yes.

Page 48, Lines 29 through 32, Page 49, Lines 1 through 14.

CHARLES FINE: When was Mrs. Buley hired?

JUDY ZEMAN: August 1, 1979.

CHARLES FINE: And who hired her?

JUDY ZEMAN: I did.

CHARLES FINE: When was she terminated?

JUDY ZEMAN: August 27 of 79.

CHARLES FINE: And who terminated?

JUDY ZEMAN: I did.

CHARLES FINE: Why was she terminated?

JUDY ZEMAN: Because she was not capable of doing the jobs assigned to her.

CHARLES FINE: By that what do you mean?

JUDY ZEMAN: In which she spent a great deal of time in the back room and in the bathroom. We had to cover her area for her with other girls in the store. Several mornings there were complaints from the departments she worked in that there was nothing straightened, nothing put back in the proper place they were supposed to be, and in general affect she was too ill to do the work.

Page 53, Lines 21 through 32, Page 54, Line 1.

CHARLES FINE: Did she continue working there the entire time?

JUDY ZEMAN: No, I move the girls around. We rotate departments quite often and she also worked the coats and dress department, children's department, and fitting room.

CHARLES FINE: Did she move stock?

JUDY ZEMAN: Very, no. In respect to unpacking merchandise and carrying the stock down, no. Other than that it was, the only stock . . .

CHARLES FINE: Why not?

JUDY ZEMAN: Because she didn't feel well and I wouldn't let her do it.

CHARLES FINE: Who was moving it.

JUDY ZEMAN: Mainly Cheryl and myself and the rest of the girls.

Office-Supreme Court, U.S.
FILED
APR 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1545 (6)

In The
Supreme Court of the United States
October Term, 1984

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, and TAMARA L. BULEY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

MOTION TO DISMISS ON BEHALF OF APPELLEE TAMARA L. BULEY, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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The Appellant's Jurisdictional Statement Contains A Number Of Factual Errors. With The Correction Of These Errors, There Is No Substantial Federal Question Presented By This Appeal.

The appeal in this case should be dismissed for the reason that it does not present a substantial federal question. The argument of Appellant in support of its jurisdictional statement is based upon a number of factual errors. When these errors are corrected, there is no substantial question presented to this Court.

The appeal of Miller-Wohl as supported by its jurisdictional statement is based upon three (3) faulty factual premises. These are:

1. That the Montana Maternity Leave Act grants a leave of absence to any pregnant employee regardless of disability. (Jurisdictional Statement, pp. 14-16).
2. That the Montana Maternity Leave Act has been found to be, or is admitted to be, preferential.
3. That Miller-Wohl's no-leave of absence policy is non-discriminatory and in compliance with Title VII of the Civil Rights Act. (Jurisdictional Statement, p. 6).

This is a case with a particular set of facts. The case must be decided upon this particular set of facts, and not upon a desired hypothetical set of facts.

Tamara Buley was hired by Miller-Wohl as a retail sales clerk at a lady's clothing store on 1 August 1979. She was hired as a regular employee in the store. Soon after her hiring, Mrs. Buley discovered that she was pregnant and promptly informed the management of her condition. Tamara Buley then experienced "morning

sickness" which caused her to leave the sales floor and be ill in the back room. On occasion, she was sent home early by her supervisor. On 27 August 1979 Miller-Wohl fired Tamara from her employment because of her pregnancy related disability.

These are the facts as they were found by the Montana Supreme Court. (Opinion, Jurisdictional Statement Appendix, pp. 4(b)-5(b)).

Appellant's Contention That The MMLA Applies To Non-Disabled Pregnant Employees Is Without Factual Basis.

The MMLA provides that an employer may not terminate a woman's employment because of her pregnancy or refuse to grant the employee a reasonable leave of absence for her pregnancy. Mont. Code Ann. Sec. 40-2-311 (1) (2). Miller-Wohl argues that because the protections afforded in the MMLA are not limited to workers who are disabled by pregnancy, then the statute could be construed to grant preferential treatment to non-disabled pregnant employees to the disadvantage of other non-disabled employees.

It must be stressed in this case, however, that Tamara Buley was disabled; she was disabled because of her pregnancy; and she was fired because of her pregnancy related disability. This is not a case where any "preference" was granted to a non-disabled pregnant employee.

Miller-Wohl raised the same argument before the Montana Supreme Court. This argument was rejected by the Montana Court when it stated:

> Miller-Wohl contends that the Federal law requires equal employment policy only when the pregnant employee is disabled and therefore the state law is in conflict with the Federal law.
>
> We reject Miller-Wohl's arguments on these points. Miller-Wohl is arguing on a statement of facts that are not before this court, and were not before the District Court nor the Commission. We are not considering in this case a non-disabled pregnant employee. Tamara Buley was disabled by virtue of her pregnancy, and eventually was discharged for that disability.

Appendix 23(b).

Miller-Wohl has not directed this Court to any decision by any Montana Court or enforcement agency which has construed the MMLA in the manner urged here by Miller-Wohl. No Montana Court or enforcement agency has ever extended the protection afforded by the MMLA to a non-disabled pregnant woman. This Court must accept the Montana Court's construction of a Montana Statute. *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961).

Miller-Wohl is attempting to establish that a substantial Federal question exists upon a set of facts which has never occurred and upon an application of the statute which has never been made. This is simply not allowed. *Alabama State Federation of Labor v. McAdory, Alabama*, 325 U.S. 450 (1945).

The MMLA Has Never Been Found To Be Or Admitted To Be Preferential.

Miller-Wohl states throughout its jurisdictional statement that the Montana Maternity Leave Act is "prefer-

ential", and even states that the statute is "admittedly preferential". (Jurisdictional Statement, p. 19). Miller-Wohl, however, does not identify what the supposed preference is. It appears that Miller-Wohl contends that the statute is preferential because the MMLA does not specifically state that its protections are based upon the pregnant employee's ability or inability to work. Therefore, argues Miller-Wohl, the MMLA grants an illegal benefit or preference to pregnant workers not enjoyed by other non-disabled workers.

First, as previously argued, this argument is based on hypothetical facts not before this Court and upon an imaginary construction and application of the statute. This Court has held that it will not decide constitutional issues upon a hypothetical construction of a statute. *Asbury Hospital v. Cass County, North Dakota*, 326 U.S. 207 (1945).

Secondly, the Montana Supreme Court dealt with this issue in holding that no preference is granted by the MMLA. (Appendix 24(b)). The Montana Court held that since an employer may not legally discharge an employee because of her pregnancy related disability, the MMLA places men and women on more equal terms. *Id.* This is because both male and female workers may be treated identically if they are disabled for any reason other than pregnancy, but the employer may not burden the female employees in such a way as to deprive them of employment opportunities because of their different reproductive role. *Id.*

Tamara Buley was fired because she was temporarily disabled by her pregnancy. If she had been a man, she

would not have been fired because she would not have been pregnant. Mrs. Buley was not granted a preference by enforcement of the MMLA. (Montana Supreme Court Opinion, App. 18(b)-19(b)). She was only granted the ability to work on the same basis as those who are not effected by the sex specific disability of pregnancy.

Miller-Wohl's contention that the MMLA in this case is "preferential" is not borne out by the facts or the law.

Miller-Wohl's No-Leave Policy Has Never Been Determined To Be Non-Discriminatory.

Miller-Wohl gives the impression in its Statement of the Case that its no leave of absence policy has been found by the Montana Human Rights Commission (MHRC) to be non-discriminatory. Miller-Wohl apparently bases this contention upon the fact that after an informal hearing, an investigator for the MHRC found that from the evidence then available, there was not reasonable cause to believe that Miller-Wohl had violated the Montana Human Rights Act or Title VII. Miller-Wohl also points out that the EEOC Complaint and the Complaint before the Montana Human Rights Commission were subsequently dismissed. Neither of these actions, however, give rise to an inference that Miller-Wohl's no-leave policy and termination of Mrs. Buley were non-discriminatory.

At the time Mrs. Buley filed her original Complaint before the Montana Human Rights Commission, jurisdiction for enforcement of the MMLA laid with the Commissioner of Labor and Industry. Since the MHRC had no jurisdiction over the MMLA, Mrs. Buley voluntarily dis-

missed the charges before the MHRC and EEOC and chose to pursue her remedies under the MMLA.

The reasonable cause finding referred to by Miller-Wohl was only made in the course of an informal investigation of the case by the MHRC. No evidence was ever presented to the Commission, nor did either party have the right to subpoena, examine, or cross-examine witnesses. Mont. Code Ann. Sec. 49-2-504. Only after a contested hearing is held before the Commission, can a finding be made that a practice was either discriminatory or not discriminatory. Mont. Code Ann. Sec. 49-2-505 through Sec. 49-2-507. Only the Commission itself may issue a finding as whether or not a policy is discriminatory, not an investigator from an informal investigation. *Id.*

Any intimation by Miller-Wohl that its no-leave policy has been found to be non-discriminatory is not supported by the facts or the law of this case. The importance of this fact is that before Miller-Wohl can contend that the MMLA is preempted by Title VII, it must show that it acted in conformance with Title VII and that the MMLA presents an insurmountable barrier to its compliance with Federal law. Since Miller-Wohl's actions have not been found to be non-discriminatory and since the Montana Supreme Court has held that both Miller-Wohl's firing of Mrs. Buley and Miller-Wohl's no leave policy are probably discriminatory under Title VII, as well as the MMLA, there can be no conflict of laws.

The Ruling Of The Montana Supreme Court Should Be Affirmed Without Further Argument For The Reason That Federal Statute And Case Law Foreclose Any Substantial Question Being Presented.

Miller-Wohl contends that its no-leave of absence policy is lawful under Title VII and therefore it cannot be compelled to change its policy to be in compliance with the MMLA. Miller-Wohl, however, does not contend that its firing of Mrs. Buley because of her pregnancy was lawful under Title VII. The firing of someone because of her pregnancy is clearly unlawful under Federal statute:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . sex . . .

42 U.S.C. Sec 2000e-2.

The term "because of sex" is defined in Section 701 (k) of Title VII, the Pregnancy Discrimination Amendment as:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions;

The firing of a worker because of pregnancy is also unlawful under Section 1 of the Montana Maternity Leave Act:

> It shall be unlawful for an employer or its agent to:
>
> (1) terminate a woman's employment because of her pregnancy.

Although Miller-Wohl contends that the validity of the MMLA should be construed in light of Miller-Wohl's

facially neutral no-leave of absence policy, the real question presented by this case is whether the State of Montana may prohibit the firing of workers because of pregnancy. The Montana Supreme Court recognized this distinction when it stated that rather than the validity of Miller-Wohl's facially neutral no-leave policy being in question, the fact that Mrs. Buley was fired because of her pregnancy was the real issue before the Court. (Appendix 18(b)). The Montana Court then held that firing a worker such as Mrs. Buley because of her pregnancy is an unlawful practice, both under Title VII and the MMLA.

Although Miller-Wohl contends that it is on the "horns of a dilemma" and that this Court should resolve that dilemma, there simply is no conflict. Since both Title VII and the MMLA prohibit the firing of employees because of pregnancy (which is what happened here), there is no inconsistency between the statutes and there is nothing for this Court to decide.

Since The PDA Is A Definitional Statute, Not A Proscriptive Statute, There Can Be No Conflict Between The PDA And The MMLA.

Miller-Wohl argues that the MMLA is preempted by the Pregnancy Discrimination Amendment of Title VII, 42 U.S.C. 2000e (k) (Jurisdictional Statement, pp. 9-11). Miller-Wohl contends that the PDA commands that all employees be treated the same under all employment policies. Therefore, argues Miller-Wohl, since it did not grant leave to any employee for any disability in their first year of employment, under the PDA it should not have to grant leave to any woman for a pregnancy related disability.

The flaw in this argument, though, is that the PDA is only a definitional statute. It does not proscribe any acts, nor does it confer any rights. The PDA merely defines what Congress meant by the phrase "because of sex" contained in the proscriptive statute of 42 U.S.C. 2000e-2.

This distinction was recognized by this Court in the case of *Newport News Ship Building in Dry Dock v. EEOC*, 462 U.S. 669, 77 L.Ed.2d 89, 99 (1983). Quite simply, it is impossible for the MMLA to be in violation of a statute which merely defines what is meant by the terms "because of sex" or "on the basis of sex".

Further, this Court held that the PDA defines the terms "because of sex" and "on the basis of sex" in two separate clauses. 77 L.Ed.2d at 99, note 14. The first clause states that "because of sex" includes on the basis of pregnancy, childbirth, or related medical conditions. 77 L.Ed.2d at 99. When this clause is read together with the proscriptive statute, 42 U.S.C. Sec. 2000e-2, Title VII prohibits discriminatory acts as follows:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual . . . because of such individual . . . (pregnancy, childbirth, or related medical conditions) (sex).

This prohibition is almost word for word the same as the prohibition contained in the MMLA. Therefore, there can be no conflict and there is no substantial question raised by this appeal.

———o———

CONCLUSION

Appellee Tamara L. Buley respectfully requests the Court to dismiss the Appeal, or in the alternative, affirm the decision of the Montana Supreme Court without further argument.

DATED this 25th day of April, 1985.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 84-1545

In the Supreme Court of the United States

OCTOBER TERM, 1985

MILLER-WOHL COMPANY, INC., APPELLANT

v.

COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA and TAMARA L. BULEY

ON APPEAL FROM THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state law that requires an employer to provide leave to employees who are pregnant is inconsistent with 42 U.S.C. 2000e(k), as amended by the Pregnancy Discrimination Act of 1978.

2. Whether such a state law violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1545

MILLER-WOHL COMPANY, INC., APPELLANT

v.

COMMISSIONER OF LABOR AND INDUSTRY OF MONTANA and TAMARA L. BULEY

ON APPEAL FROM THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Appellant operates a chain of retail stores selling ladies' apparel, including several stores in Montana. The Montana stores are subject to the Montana Maternity Leave Act (MMLA), which prohibits private employers from terminating an employee because of pregnancy and requires them to "grant the employee a reasonable leave of absence for such pregnancy" (Mont. Code Ann. § 39-7-203 (1983)).

Appellant's Montana stores operate under a published employment policy that provides, inter alia,

that no employee is entitled to sick leave or to a leave of absence until that employee has worked for appellant for at least one year. This policy applies to every employee, male or female, and allows no exception for any disability.

In August 1979, appellee Tamara Buley began employment as a part-time sales clerk in appellant's Great Falls, Montana, store. Almost immediately, Buley began to miss work because of illness (J.S. App. 4b-5b). Within two weeks, Buley discovered she was pregnant and told her supervisor. "Morning sickness" resulting from her pregnancy interfered with her job performance, and caused repeated absences. She was accordingly dismissed within four weeks of beginning employment. Buley protested her termination in a complaint filed with the Montana Commissioner of Labor and Industry (the Commissioner), in which she claimed that appellant had violated the MMLA by discharging her because of pregnancy. J.S. App. 5b.[1]

2. Appellant brought suit against the Commissioner and Buley in the United States District Court for the District of Montana, seeking to enjoin enforcement of the MMLA by the Commissioner. The district court initially issued a temporary restraining order prohibiting entertainment of Buley's complaint but, on expiration of the order, allowed the Commissioner to proceed. J.S. App. 5b.

On October 3, 1980, the Commissioner awarded Buley backpay, ruling that appellant had violated the

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[1] It is not clear from the record whether Buley was discharged because of her pregnancy per se or because she was performing her work unsatisfactorily as a result of her pregnancy. It also is not clear whether the Commissioner or any court has made a finding on that issue.

MMLA by dismissing her. The Commissioner also ruled that the MMLA did not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or Title VII of the Civil Rights Act of 1964 (the Act), 42 U.S.C. 2000e *et seq.* (J.S. App. 1d-26d).

The federal district court subsequently concurred in the Commissioner's conclusions (J.S. App. 5b; 515 F. Supp. 1264). On appeal, however, the Ninth Circuit declined to reach the merits and vacated the district court's judgment for want of jurisdiction. 685 F.2d 1088 (1982). The Court reasoned that appellant's federal claims were simply defenses to Buley's state claim, and thus did not provide an independent basis for federal jurisdiction (*id.* at 1090).

3. Appellant petitioned in state court for review of the Commissioner's decision. On February 8, 1984, the state district court reversed the Commissioner's order, holding that the MMLA violates the Supremacy Clause (Art. VI, Cl. 2) because it is inconsistent with Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, 92 Stat. 2076 *et seq.* (J.S. App. 1c-4c). The Commissioner and Buley appealed that decision to the Montana Supreme Court.

The Montana Supreme Court reversed (J.S. App. 1b-27b). The court ruled that the MMLA does not conflict with Title VII, as amended by the PDA, because the "policy and purpose of the MMLA is to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females" (J.S. App. 4b). Assuming that appellant's no-leave policy has a disparate impact on women and violates Title VII for this reason (J.S. App. 20b), the court

agreed with the federal district court (515 F. Supp. at 1266) that the MMLA's requirement for special treatment of the pregnant "places men and women on more equal terms" and therefore satisfies Title VII (J.S. App. 24b). Thus, the Montana Supreme Court ruled that the MMLA is consistent with the PDA precisely because it provides special treatment for disabilities associated with pregnancy.

DISCUSSION

This case raises a difficult conflict between two sets of broad and significant concerns: on the one hand, there is the nondiscrimination principle, in particular as it applies in the employment area to open to all persons the full range of economic opportunities; on the other hand, there is the recognition of the traditional role of the states in promoting family life, particularly in protecting maternal and infant health. The United States responds to the Court's invitation against the background of these concerns, which are shared by Congress, whose intent ultimately it is our duty to discern.

We conclude that Congress in the PDA adopted a form of words that clearly committed it to the nondiscrimination principle, mandating that "women affected by pregnancy [or] childbirth * * * shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work * * *" (42 U.S.C. 2000e(k)). But Montana has regulated in such a way that if employers complied without more, they would indeed be discriminating on grounds of pregnancy, by favoring, not disadvantaging, the subject class. If federal law were silent, state legislation so favoring this class would, in our view, plainly pass

constitutional muster. Because such favoring legislation is not permitted by Title VII, however, the decision of the Supreme Court of Montana cannot stand.

1. In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court considered the legality of an employer's disability benefit plan that excluded disabilities arising from pregnancy. Relying on *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), which rejected an attack on a similar program on constitutional grounds, the Court held that the G.E. plan did not violate Title VII. "Since it is a finding of sex-based discrimination that must trigger * * * the finding of an unlawful employment practice under § 703(a)(1)," the Court held that "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all" (429 U.S. at 136).

In response to the *Gilbert* ruling, Congress enacted the PDA, which amended Section 701 of Title VII. The first clause of the new subsection made clear that Title VII's prohibition of discrimination " 'because of sex' " or " 'on the basis of sex' " was intended to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" (42 U.S.C. 2000e(k)). The second clause declared that (emphasis added):

> [W]omen affected by pregnancy, childbirth, or related medical conditions *shall be treated the same for all employment-related purposes*, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work * * *.

The language of Title VII, as amended by the PDA, is thus clear and unqualified in its sweep: it is as ringing an affirmation of the nondiscrimination principle as could be imagined. Here, as in *Maine* v. *Thiboutot*, 448 U.S. 1, 8 (1980) (footnote omitted):

> Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended. [Appellees'] arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationship [between state and federal laws], it might have acted differently. That argument, however, can best be addressed to Congress * * *.

See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980) (language used by Congress normally "must be construed to mean exactly what it says"); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 492 (1947); *Gemsco* v. *Walling*, 324 U.S. 244, 260 (1945).

Although "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute" (*Harrison* v. *PPG Industries, Inc.*, 446 U.S. at 592), here the legislative history of the PDA is fully consistent with the broad language Congress employed. The House Report (H.R. Rep. 95-948, 95th Cong., 2d Sess. 4 (1978)), for example, emphasized that the legislation would require equal rather than preferential treatment of pregnant employees:

> This legislation would clearly establish that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 includes a prohibition against employment-related discrimination on the basis of pregnancy, childbirth, or related medical conditions. * * *
>
> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. [The PDA] in no way requires the institution of any new programs where none currently exist. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

See also *id.* at 3, 5, 6. The Senate Report reflects the same intent (S. Rep. 95-331, 95th Cong., 1st Sess. 4 (1977)):

> [T]he bill, because it would operate as part of title VII, prohibits only discriminatory treatment. Therefore, the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.

The great bulk of the floor statements speak in similarly unqualified terms.[2] Although the context

[2] For example, when the PDA was being debated on the Senate floor, Senator Brooke stated: "I would emphasize

of these pronouncements and of the legislative effort as a whole was to eliminate pregnancy as an occasion for disadvantaging discrimination, and the question of prohibiting advantaging discrimination was not directly considered, Congress nonetheless announced a general principle outlawing *any* difference in treatment, for *any* employment-related purpose, on grounds of pregnancy. Absent some clear indication in the legislative history to the contrary (and we have found none),[3] it is that principle which should be applied according to its terms. See *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 681 (1983) (the PDA was "intended to protect *all* individuals from sex discrimination in employment—including pregnant women workers") (emphasis in original).

2. a. In determining whether a federal law preempts a state statute, and thus renders it invalid under the Supremacy Clause (Art. VI, Cl. 2), a court's task is to ascertain Congress's intent in en-

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most strongly that S. 995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be treated with fairness, to be accorded the same employment rights as men" (123 Cong. Rec. 29664 (1977)). See also 123 Cong. Rec. 7541 (1977) (remarks of Senator Mathias); 123 Cong. Rec. 29659 (1977) (remarks of Senator Williams); 123 Cong. Rec. 29661 (1977) (remarks of Senator Biden); 123 Cong. Rec. 29663 (1977) (remarks of Senator Cranston).

[3] The favorable references to "[state] laws which specifically refer to pregnancy" (S. Rep. 95-331, 95th Cong., 1st Sess. 3 (1977)) and particularly to the Montana statute as an example of such a law (H.R. Rep. 95-948, 95th Cong., 2d Sess. 11 (1978)) do not demonstrate that Congress was aware of the terms of these statutes, still less that Congress had determined that they were consistent with the PDA.

acting the federal statute at issue. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). "Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose,' " *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 152-153 (1982), quoting *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of express congressional intent to occupy a field, state legislation cannot stand when it is impossible to comply with both state and federal law, see *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or when state law frustrates accomplishment of the full purposes of Congress. See *Capital Cities Cable, Inc.* v. *Crisp*, No. 82-1795 (June 18, 1984), slip op. 5-6; *Hines* v. *Davidowitz*, 312 U.S. 52, 67-68 (1941).

The Civil Rights Act of 1964 includes specific provisions regarding its preemptive effect on state legislation. Section 1104 of the Act, 42 U.S.C. 2000h-4 provides:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provisions thereof.

In addition, Section 708 of the Act, 42 U.S.C. 2000e-7 provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability,

> duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

In light of the purposes of the PDA, discussed above, and this clear statement of preemptive intent, we conclude that the Montana statute must be invalidated. The MMLA announces the policy of the State of Montana that an employer must grant benefits to pregnant women that it need not grant to other employees. An employer that abides by that state policy would run afoul of the requirement imposed by Title VII, as amended by the PDA, that pregnant women "be treated the same" as other persons not so affected "for all employment-related purposes". (42 U.S.C. 2000e(k)). Thus, Montana law is "inconsistent with" one of the purposes of Title VII and "require[s] or permit[s] the doing of an[] act which would be an unlawful employment practice under" Title VII.

We do not believe that this conflict between state and federal law may be eliminated by construing the MMLA to require employers within the State to extend the benefits mandated for pregnant women to all members of the workforce. To be sure, such a construction of state law would allow an employer to comply with both the MMLA and Title VII. But it would be most inappropriate for a federal court to save a state statute by mandating, in the name of Title VII, a general program of unpaid disability leave for *all* employees, when there is no indication that the State intended to impose such a burden on its employers. See *Heckler* v. *Mathews*, No. 82-1050

(Mar. 5, 1984), slip op. 9 n.5. If Montana's family protective purposes are to be served by a radically more extensive scheme, the courts or legislature of the State should make that judgment. Indeed, the Montana Supreme Court had the opportunity to interpret its statute in this way and declined to do so, referring the question to the state legislature for consideration (J.S. App. 26b).

Given this authoritative state court construction of the MMLA, this Court should invalidate the Montana statute under the Supremacy Clause because it requires in terms what Congress has forbidden. On remand, the Montana court may then consider whether, in view of this Court's construction of Title VII, the MMLA should be interpreted so as to generalize its benefits and thus to bring the state statute into conformance with federal law. See *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 152-153 (1980) ("[b]ecause state legislation is at issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation"). But that is a decision that should not be anticipated here.[4]

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[4] To solve the discrepancy between state law and Title VII by requiring employers in Montana to extend MMLA benefits to all employees as a matter of federal law—rather than pursuant to a possible later reconsideration by the State of its own policies—might well be inconsistent with the clearly expressed intent of Congress in enacting the PDA. Congress repeatedly emphasized that it intended that employers be free to provide any level of benefits they wished—or none at all—so long as they did not use pregnancy as a criterion for allocating those benefits. See, *e.g.*, S. Rep. 95-331, *supra*, at

b. In addition to its argument based on the Supremacy Clause, appellant claims that, by requiring special benefits for pregnant women, the MMLA violates the Equal Protection Clause of the Fourteenth Amendment (J.S. 17-19). The Court need not reach the constitutional question in this case, because the MMLA is inconsistent with the PDA. In any event, *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), forecloses appellant's constitutional claim. *Geduldig* held that state classifications based on pregnancy are not gender classifications under the Equal Protection Clause. That ruling is dispositive here. It cannot be contended that the State lacks a rational basis for singling out pregnant women for special protections. See *Harris* v. *McRae*, 448 U.S. 297, 325 (1980).

3. For these reasons, we believe that appellants have presented a substantial federal question that warrants the Court's review. We note, however, that this case contains certain complexities and ambiguities that may make it a less convenient vehicle for exploring this issue than *California Federal Savings & Loan Ass'n* v. *Guerra (Cal Fed)*, petition for cert. pending, No. 85-494.

Cal Fed was decided on cross motions for summary judgment on the basis of stipulated facts. In that case, it was stipulated that the employer grants unpaid disability leave of up to six months to all employees who have completed a three-month probationary period, but reserves the right to discharge the

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4; H.R. Rep. 95-948, *supra*, at 5; 123 Cong. Rec. 29664 (1977) (remarks of Senator Biden); *id.* at 7541 (remarks of Senator Brooke). To reconcile the PDA with the MMLA, therefore, it would be necessary to interpret the PDA as requiring in this context exactly what Congress deliberately eschewed, *i.e.*, extension of benefits by a nondiscriminating employer.

employee if no suitable position is available when the employee recovers from the disability. The State of California interprets this policy as inconsistent with Cal. Gov't Code § 12945(b)(2) (West 1980), which requires reinstatement of employees after maternity leave unless the employer shows a business necessity for its refusal to do so. 85-494 Pet. App. E6-E12.

In *Cal Fed*, the court of appeals expressly declined to rely on any disparate impact that the employer's policy might have on pregnant women (85-494 Pet. App. A6-A7); there is, accordingly, no suggestion in the *Cal Fed* opinion that the employer's policy violated Title VII as well as the state statute, as there is in this case (see J.S. App. 3b, 18b-20b). Moreover, in the instant case, there is the possibility that appellant engaged in disparate treatment of Buley. It is not entirely clear from the opinion or the record whether she was discharged because of her pregnancy per se or because she was performing her work unsatisfactorily (compare J.S. App. 15b, 18b with 16b-17b). If she were dismissed simply because she was pregnant, appellant would have violated both state and federal law, and Buley would be entitled to relief without regard to the validity of the MMLA. Conduct that violates both federal and state law provides a poor basis for a Supremacy Clause challenge.[5]

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[5] An additional complication in this case is the fact that it arose within one year of enactment of the PDA and therefore might be subject to the PDA's prohibition against reducing benefits to any employee. See ACLU Am. Br. 33-45. We disagree with the ACLU's submission, because Section 3 of the PDA (92 Stat. 2076-2077) does not apply where, as here, an employer was not providing any benefits on the effective date of the Act. See 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins). See also S. Rep. 95-331, *supra*, at 8; H.R. Rep. 95-948, *supra*, at 154; 123 Cong. Rec. 75411 (1977) (re-

To be sure, this case has certain attractive features not present in *Cal Fed*. Principal among these is the fact that the case comes from the Montana Supreme Court, which has provided an authoritative interpretation of the state statute. In these circumstances, the Court may wish to note probable jurisdiction in this case, grant certiorari in *Cal Fed*, and either hear the cases in tandem or consolidate them for purposes of oral argument.

CONCLUSION

Probable jurisdiction should be noted, and the case should be considered with *California Federal Savings & Loan Ass'n* v. *Guerra*, No. 85-494.

Respectfully submitted.

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NOVEMBER 1985

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marks of Senator Brooke). Nevertheless, *Cal Fed* does not contain this complication.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20066

MOTION FILED
APR 26 1985

Supreme Court, U.S.
[redacted]
APR 26 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1545

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE MILLER-WOHL COMPANY, INC.,
Appellant,
v.
COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, and TAMARA L. BULEY,
Appellees.

On Appeal from the Supreme Court of Montana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1545

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, and TAMARA L. BULEY,
Appellees.

On Appeal from the Supreme Court of Montana

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States moves for leave to file the attached brief *amicus curiae* pursuant to Supreme Court Rule 36.1. Appellant Miller-Wohl has consented to the filing of this brief.[1] This motion is necessary because counsel for Appellee Commissioner of Labor and Industry has refused to consent to the filing of this brief, and efforts to obtain the consent of counsel for Appellee Tamara L. Buley were unsuccessful.

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Its current membership exceeds 184,000, including over

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[1] A copy of the consent letter has been filed with the Clerk.

180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. Moreover, the Chamber has over 1,162 members in the state of Montana.

As one of its principal functions, the Chamber regularly presents its members' views in court on a broad range of legal issues, including equal employment issues.[2] This case involves the scope of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1984) ("PDA"). At issue is whether a Montana law that requires preferential treatment of pregnant employees is preempted by the PDA.

The PDA has been of particular interest to the Chamber since its enactment. As a result, the Chamber has participated in several cases concerning its scope. *See, e.g., Kansas Association of Commerce and Industry* v. *EEOC*, 22 Fair Empl. Prac. Cas. (BNA) 1343 (D. Kan. 1980) (the first case filed in federal district court challenging the Equal Employment Opportunity Commission's promulgation and enforcement of Final Interpretive Guidelines concerning the PDA, 29 C.F.R. § 1604.10(b) (1981)); *Newport News Shipbuilding and Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983) (involving the question of whether a company's health insurance plan that covers the medical expenses of female employees' spouses discriminates against male employees, if it does not cover their spouses' medical expenses arising from pregnancy-related conditions).

Most recently, the Chamber filed a brief in the Ninth Circuit on a preemption question similar to the one pre-

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[2] *See, e.g., United Telecommunications, Inc.* v. *Saffels, cert. denied*, 53 U.S.L.W. 3669 (U.S. Mar. 18, 1985) (No. 84-1002); *Northwest Airlines, Inc.* v. *Laffey, cert. denied*, 53 U.S.L.W. 3507 (U.S. Jan. 14, 1985) (No. 84-825); *U.S. Postal Service* v. *Aikens*, 460 U.S. 711 (1983).

sented here. *See, California Federal Savings & Loan Ass'n* v. *Guerra*, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984), *rev'd*, Nos. 84-5843 and 44, slip op. (9th Cir. Apr. 16, 1985) (holding that Title VII does not preempt a California statute that requires employers to grant up to four months of pregnancy disability leave to employees "disabled on account of pregnancy, childbirth, or related medical conditions"). In light of the Ninth Circuit's recent decision, it is particularly important that the business community's perspective on preferential treatment in the workplace be presented to this Court.

The Montana statute at issue in this case requires employers to grant "reasonable leave of absence" to pregnant employees, whether disabled or not, and to reinstate them when they come back to work. Montana Maternity Leave Act, Mont. Code Ann. § 49-2-310 to 311 (1983).[3] These requirements apply regardless of the employer's existing policy on disability leave. Thus, employers in Montana must grant leave to pregnant employees, even when company policy does not provide leave to other employees.

Preferential state laws in an area pervasively regulated by the federal government present difficult problems for many Chamber members in Montana and in other states. Montana members find themselves caught in the untenable position of trying to comply with a state law that requires *special treatment* of pregnant employees when federal law requires *equal treatment* of all employees.

Multistate employers face an even greater dilemma, having to reconcile the preferences mandated by vari-

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[3] The Montana Maternity Leave Act was originally codified at Mont. Code Ann. §§ 39-7-210 *et seq.* and was recodified, effective July 1, 1983, at Mont. Code Ann. § 49-2-310 under the Montana Human Rights Act.

ous state laws with a federal statute that mandates equality in the workplace. Without federal preemption, uniform personnel policies will be impossible and compliance improbable. Disparate personnel practices will cause dissension within the workforce, and subject employers to charges of discrimination from disabled male employees as well as female employees with non-pregnancy-related disabilities.

The Chamber is concerned about the labor relations problems that result from the Montana Maternity Leave Act and similar state statutes that require preferential treatment of pregnant employees. The Chamber is also concerned about the impact of preferential state laws on national uniformity within the equal employment opportunity field. For these reasons, the Chamber respectfully submits this brief, and urges this Court to note probable jurisdiction on this important Title VII issue.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1545

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, and TAMARA L. BULEY,
Appellees.

On Appeal from the Supreme Court of Montana

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE JURISDICTIONAL STATEMENT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief *Amicus Curiae* for a statement of its interest in this proceeding.

INTRODUCTION

This appeal from the Supreme Court of Montana arises out of Miller-Wohl's attempt to enjoin the enforcement of the Montana Maternity Leave Act, Mont. Code Ann. § 49-2-310 to 311 (1983).[1] That statute, as en-

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[1] The Montana Maternity Leave Act was originally codified at Mont. Code Ann. §§ 39-7-201 *et seq.*, and was recodified, effective July 1, 1983 at Mont. Code Ann. § 49-2-310 under the Montana Human Rights Act.

forced by the state, requires employers to grant "a reasonable leave of absence" to pregnant employees and to reinstate them when they return to work. The state law applies even when pregnancy is not disabling and company policy does not grant disability leave or reinstatement rights to other temporarily disabled employees.[2]

Miller-Wohl challenged the Montana Maternity Leave Act in the court below on the grounds that it requires preferential treatment of pregnant employees in violation of Title VII, the Pregnancy Discrimination Act (which amended Title VII in 1978) ("PDA"), and Title XI of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e, 2000e(k), and 2000h-4. Miller-Wohl also argued that the Montana law is preempted by these federal statutes, and therefore is null and void under the Supremacy Clause. The court below rejected the company's arguments and upheld the state statute as consistent with federal law.[3]

The Chamber believes that the Montana statute interferes with the intent of Congress in amending Title VII

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[2] Section 49-2-310 provides, in relevant part:

> It shall be unlawful for an employer or his agent to:
>
> (1) terminate a woman's employment because of her pregnancy;
>
> (2) refuse to grant the employee a reasonable leave of absence for such pregnancy;
>
> (3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer; provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties.

[3] The decision of the Montana Supreme Court is reported at 692 P.2d 1243 (Mont. 1984), and is reprinted in Miller-Wohl's Jurisdictional Statement at Appendix b.

to include the Pregnancy Discrimination Act. The legislative history of the PDA states in no uncertain terms that Congress intended employers to treat pregnant employees *the same* as all other employees. Congress did not intend to require employers to provide special treatment to pregnant employees who are not disabled. Nor did Congress intend to require employers to make special provisions for pregnant employees when similar provisions do not exist for other employees. Yet these are precisely the types of requirements Montana has imposed by enacting and enforcing this statute. The Montana Maternity Leave Act is an obstacle to federal equal employment objectives, and employers cannot comply with it without violating federal law. For these reasons, this Court should note probable jurisdiction in this case.

ARGUMENT

I. THE MONTANA MATERNITY LEAVE ACT MANDATES PREFERENTIAL TREATMENT OF PREGNANT EMPLOYEES IN VOLATION OF FEDERAL LAW.

This Montana statute requires preferential treatment of pregnant employees in two ways. It requires employers to grant employees "reasonable leave of absence" and reinstatement simply because they are pregnant, without regard to their ability to work. And it imposes these requirements regardless of the employer's existing personnel policies. Thus, employers in Montana must provide leave to pregnant employees, regardless of disability and regardless of whether company policy provides leave to other employees. By providing pregnant employees with greater rights than are accorded other employees, the Montana statute flies in the face of the Pregnancy Discrimination Act and its legislative history. In so doing, the state statute contravenes federal law, and must be struck down.

Congress enacted the PDA as an amendment to § 701 of Title VII.[4] Its purpose was to ensure equal treatment of pregnant employees in the workplace by overruling this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976).[5] In *Gilbert*, this Court had ruled that employers who excluded pregnancy-related disabilities from an employee disability income plan did not discriminate on the basis of sex in violation of Title VII.

In reversing *Gilbert*, Congress made it clear that an employee disabled by pregnancy is to be treated like any other disabled employee. The PDA and its legislative history conclusively establish that Congress did not intend preferential treatment of pregnant employees. Section 2000e(k) explicitly states that "women affected by pregnancy" shall be treated "*the same* for all employment-related purposes . . . *as other persons not so affected but similar in their ability or inability to work*" (emphasis added).

Thus, under the PDA, employers who do not provide benefits to other disabled employees are not required to provide them to employees disabled by pregnancy. The

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[4] The Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)), provides in relevant part:

> (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

[5] *See* Committee Print of the Legislative History of the PDA prepared for the Senate Committee on Labor and Human Resources (June 1980) (hereinafter "Leg. Hist.") at 132.

statute "in no way provides special disability benefits for working women." 123 Cong. Rec. 29,664 (1977) (statement of Senator Brooke, co-sponsor of S. 995, the bill that ultimately became the PDA). Rather, the PDA requires an employer to provide employees disabled by pregnancy with the same benefits, for the same period, and on the same terms as provided to other disabled employees. The "employment-related purposes" for which the PDA mandates equal treatment include disability benefits, medical benefits, leaves of absence, sick leave and reinstatement rights. Leg. Hist. at 41-43.

A. Federal Law Requires Equal, Not Special Treatment.

In addition to the plain meaning of § 2000e(k), the legislative history of the PDA contains repeated expressions of congressional intent that pregnant employees receive equal, but not special, treatment. Of particular note are the words of Congressman Hawkins, a principal sponsor of the House bill:

> Like title [sic] VII, generally, [the PDA] merely requires that employers not discriminate. Thus, an employer *who does not now* provide disability benefits to his employees *will not have to* provide such benefits to women disabled due to pregnancy or childbirth.

Leg. Hist. at 25 (emphasis added).

Other members of Congress were similarly emphatic about not requiring employers to create special benefits for pregnant employees. Senator Williams, Chairman of the Senate Human Resources Committee and a chief sponsor of S. 995, remarked in debate:

> [I]t is important to bear in mind that this legislation does *not* require that any employer *begin* to provide health insurance *where it is not presently provided.* Rather, it requires that employers who do

> provide health insurance do so on a non-discriminatory basis.

Leg. Hist. at 64 (emphasis added).[6]

And according to the Senate report on S. 995, "[a]n employer who does not provide disability benefits or paid sick leave to other employees will not, because of S. 995, have to provide these benefits" to pregnant employees. Leg. Hist. at 41. Clearly, Congress intended only that employers provide pregnant employees with the same benefits already available to other employees.

Contrary to the PDA and its legislative history, the Montana Maternity Leave Act does not treat pregnant employees "the same" as other employees. Rather, the Montana statute requires employers to grant leave to pregnant employees, even if they are not disabled by pregnancy and company policy does not provide similar leave to other workers. Congress did not intend to allow, much less mandate, such unequal treatment in the workplace. Preferential treatment of pregnant employees, as legislated by the Montana statute, squarely conflicts with federal law, and must be struck down.

B. Federal Law Protects Only Employees Who Are Disabled by Pregnancy.

The plain meaning of the PDA and its legislative history firmly establish that pregnant employees must be treated equally with other employees based on their "ability or inability to work." The PDA does not protect employees who are simply pregnant, yet still able to work. Instead, it prohibits discrimination against employees when pregnancy *prevents* them from working, and en-

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[6] While Senator Williams' comments are directed at health insurance rather than disability leave, the relevance of his comments is clear. No special treatment of pregnant employees is required by the statute.

sures that employers will provide them with the same benefits as accorded to other disabled employees.

The legislative history of the PDA is replete with examples of congressional intent to focus on the pregnant employee's ability to work, and not on the mere fact of pregnancy. The Senate report on S. 995 states as its "basic principles" that:

> Under this bill, the treatment of pregnant women in covered employment must focus *not on their condition alone but on the actual effects of that condition on their ability to work.* Pregnant women *who are able to work* must be permitted to work on the same conditions as other employees; and *when they are not able to work* for medical reasons, *they must be accorded the same rights,* leave privileges and other benefits, *as other workers who are disabled from working.*

Leg. Hist. at 41 (emphasis added).

Accordingly, "an employer will not have to allow pregnant women to use paid sick leave or receive disability benefits simply because they are pregnant; benefits need to be paid only on the same terms applicable to other employees—that is, generally, only when the employee is medically unable to work." *Id. See also,* Statement of Senator Stafford in debate on S. 995 ("[T]his bill demands equal treatment and nothing more. When an employer treats pregnancy, childbirth, and related conditions the same as he treats any other disabling condition, then he has complied with this bill."). Leg. Hist. at 83.

When introducing the House bill (H.R. 5055), Congressman Hawkins explained:

> Nor does the bill require that employers . . . provide leave *simply because* [employees] *are pregnant. . . .* Rather, *it recognizes that for most of the time a woman is pregnant she is,* in most cases, *able to con-*

> *tinue working*, and should be allowed to do so. It also recognizes that pregnancy and childbirth does [sic] cause some period during which a woman is *medically unable to work*. For 95 percent of women, that period is 6 weeks or less. *It is only during this period*, unless there are complications which cause the woman to be *disabled* longer, for which disability benefits or leave are required on the same basis applicable to other employees with temporary disabilities.

Leg. Hist. at 25 (emphasis added).

In direct conflict with the PDA, the Montana Maternity Leave Act makes it unlawful for employers to refuse to grant "reasonable leave of absence" to pregnant employees, whether disabled or not. By requiring employers to extend such leave without regard to ability to work, the Montana statute contravenes the express intent of Congress in passing the PDA. Congress specifically provided for *equal* treatment of employees *disabled* by pregnancy, not preferential treatment of employees when pregnancy does not prevent them from working. Thus, the Montana statute conflicts with federal law, with regard both to equal treatment and disability.

II. THE MONTANA MATERNITY LEAVE ACT IS PREEMPTED BY FEDERAL LAW AND INVALIDATED BY THE SUPREMACY CLAUSE OF THE CONSTITUTION.

Under the Supremacy Clause of the Constitution,[7] a state law is invalid if Congress has shown an intent to occupy a given field,[8] or if state and federal law conflict. *Silkwood* v. *Kerr-McGee Corp.*, —— U.S. ——, 104 S. Ct. 615, 621 (1984). Titles VII and XI also contain specific

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[7] U.S. Const. art. VI, § 2.

[8] This type of preemption is inapplicable here, as Congress did not intend to occupy the entire equal employment opportunity field. *See* 42 U.S.C. §§ 2000e-7 and 2000h-4.

provisions regarding statutory preemption. Title VII preempts any state law that operates to require or permit unlawful employment practices. § 708, 42 U.S.C. § 2000e-7. Similarly, Title XI invalidates any state law that "is inconsistent with the purposes of this Act." § 1104, 42 U.S.C. § 2000h-4. The Montana Maternity Leave Act must be struck down under both the Supremacy Clause and the preemption provisions of Titles VII and XI.

This Court has made it clear that the Supremacy Clause invalidates state legislation when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Hines* v. *Davidowitz*, 312 U.S. 52, 67-68 (1941). *Accord, Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. at 621. The Montana Maternity Leave Act causes both of these problems. Moreover, it operates to require unlawful employment practices, and is plainly inconsistent with the purposes of the Equal Employment Opportunity Act. For these reasons, this Court should note probable jurisdiction.

A. Employers Cannot Comply With The Montana Statute Without Violating Federal Law.

The Montana Maternity Leave Act is clearly at odds with the PDA. Unless it is invalidated, employers in Montana will continue to be faced with the task of complying with a state statute that requires special treatment of pregnant employees when federal law requires equal treatment of all employees. These two mandates are entirely inconsistent. Employers cannot comply with one without violating the other.

The PDA "does not . . . require that an employer do anything more for his pregnant employees than he does for any other employees." 123 Cong. Rec. 29,663 (1977). In fact, it "would prohibit as sex discrimination any personnel practice . . . which treats pregnancy . . . differently

than other conditions which also cause inability to work . . . ." *Id.* at 29,387. As demonstrated above, the Montana statute flies in the face of the PDA by providing pregnant employees greater rights than are accorded other employees. In so doing, the state statute contravenes federal law, and must be struck down.

Any suggestion that the conflict between the Montana Maternity Leave Act and the PDA can be eliminated by extending the state-mandated benefits to all employees must be rejected. Requiring Miller-Wohl to revise company policy, first by granting preferential leave to pregnant employees and then by extending leave to all employees, would turn the PDA on its head. This result is not required by federal law, and imposing it would violate that law. *Homemakers, Inc.* v. *Division of Industrial Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976).

B. The Montana Statute Undermines the Objectives of Federal Law.

Federal law requires equal treatment of all disabled employees, pregnant or otherwise, and does not permit arbitrary preferences of one type of disability over another. Differential treatment on the basis of pregnancy constitutes sex discrimination in violation of Title VII. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, —— U.S. ——, 103 S. Ct. 3492, 3498 n.14 (1983). *See also, General Electric Co.* v. *Gilbert*, 429 U.S. 125, 161-62 (1976) (Brennan, J., dissenting) ("Surely it offends common sense to suggest . . . that a classification revolving around pregnancy is not, at the minimum, strongly 'sex-related.'"). The Montana Maternity Leave Act conflicts with this goal of equal opportunity by requiring preferential treatment of pregnant employees, without regard to their ability to work. The requirements of the Montana statute legislate discrimination in direct violation of Title VII.

The PDA was designed to protect workers disabled by pregnancy from employment practices *not* faced by other disabled workers. 123 Cong. Rec. 29,387. It adopted equality of treatment as its standard, making benefits contained in existing personnel programs the measure of an employer's duty toward pregnant employees. In contrast, the Montana Maternity Leave Act has adopted preferential treatment as its standard, thereby undermining the objectives of federal law.

CONCLUSION

The preferences mandated by this state statute contravene the purposes of the PDA, forcing employees to choose between state and federal law because they cannot comply with both. For these reasons the Chamber respectfully urges this Court to note probable jurisdiction in this case.

Respectfully submitted,

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April 26, 1985

MOTION FILED
APR 26 1985

Supreme Court, U.S.
FILED
APR 26 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1545

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY,
STATE OF MONTANA, AND TAMARA L. BULEY,
Appellees.

On Appeal from the Supreme Court of Montana

MOTION FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, AND TAMARA L. BULEY,
Appellees.

On Appeal from the Supreme Court of Montana

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rules 36 and 42 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) moves this Court for leave to file the accompanying brief as amicus curiae supporting the Jurisdictional Statement of the Appellant, the Miller-Wohl Company, in this case. In support of this motion, EEAC shows as follows:

1. The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and

requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. Substantially all of the Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, which incorporates the Pregnancy Discrimination Act, as well as other federal and state statutes, orders, and regulations pertaining to nondiscriminatory employment practices. As such, these members are vitally concerned with the issue presented in this case; *i.e.*, whether a state statute mandating that women disabled by pregnancy, childbirth, or related conditions be given a benefit to which other disabled employees are not entitled conflicts with the federal Pregnancy Discrimination Act and therefore preempted by federal law.

3. The movant, EEAC, is concerned with the broader implications of this case. Particularly, we are concerned that affirmance of the Montana Supreme Court's decision would open the door for states to codify various types of preferential treatment for women affected by pregnancy. As shown in more detail in the attached brief, such state legislation would

almost inevitably clash with Title VII's requirement that employment benefits cannot be denied to employees on the basis of sex—here, male employees and non-pregnant female employees. Thus, compliance with such state pregnancy benefit statutes could render employers liable to other employees who are not entitled to the same benefits.

It has been suggested that employers could resolve this potential Title VII liability by voluntarily extending to all employees those benefits which state law requires only for pregnant employees. Such a suggestion, however, creates an improper infringement upon traditional business prerogatives and uses potential federal liability to force employers to adopt policies beyond even those chosen by the state legislature. Consequently, EEAC's members have a substantial interest in determining whether state laws in fact create a potential conflict with Title VII. If allowed to participate as amicus curiae, EEAC will demonstrate that the importance of these broader issues warrants that jurisdiction be noted and the case accepted for further briefing and argument. EEAC is uniquely qualified to do so, based upon its prior experience with these issues and as amicus curiae in cases raising related questions.

4. Because of its interest in issues pertaining to equal employment, EEAC on several other occasions has sought and been granted permission by the Court to file briefs as amicus curiae. *See, e.g., Cannon v. The University of Chicago, et al.*, 441 U.S. 677 (1979); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Gardner v. Westinghouse Broadcasting Company*, 437 U.S. 478 (1978); and *Shell Oil Company v. Anne M. Dartt*, 434 U.S. 98 (1977).

5. EEAC also has filed briefs as amicus curiae with the consent of the parties in a number of other cases raising important equal employment issues relating to pregnancy, gender classifications, the use of statistical evidence, and the relationship between state and federal non-discrimination law. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, —— U.S. ——, 103 S. Ct. 2622 (1983); *Shaw v. Delta Air Lines, Inc.*, —— U.S. ——, 103 S. Ct. 2890 (1983); *Arizona Governing Committee v. Norris*, —— U.S. ——, 103 S. Ct. 3492 (1983); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Alexander v. Choate*, —— U.S. ——, 105 S. Ct. 712 (1985); and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Furthermore, EEAC participated as amicus curiae in *California Federal Savings & Loan Association v. Guerra, et al.*, Nos. 84-5843, 84-5844, slip op. (9th Cir. April 16, 1985), a recent Ninth Circuit case addressing a question similar to that before the Court in this case.

6. The written consent of counsel for the appellant and appellee Tamara Buley to the filing of this brief will be filed with the Clerk of the Court. Counsel for appellee, the Commissioner of Labor of the State of Montana, has declined to consent to the filing of this brief, thereby necessitating this motion.

Respectfully submitted,

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April 26, 1985

IN THE

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OCTOBER TERM, 1984

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Appellees.

On Appeal from the Supreme Court of Montana

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE JURISDICTIONAL STATEMENT

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae contingent upon the granting of the attached motion. This brief urges that this case presents a substantial question and therefore should be accepted for further review and oral argument.

STATEMENT OF THE CASE

The Appellant, the Miller-Wohl Company, operates a chain of women's clothing stores located throughout the United States. On August 1, 1979, the Appellant hired Tamara Buley as a part-time sales clerk in its Great Falls, Montana store. During her

first month of employment, Ms. Buley was sick at work on several occasions and also missed work as a result of suffering from "morning sickness." Consequently, she was unable to perform the responsibilities of the job for which she was hired. Because Miller-Wohl's employment policy provides that an employee is not entitled to obtain a leave of absence for *any* sickness or maternity or to receive any paid sick leave for *any* illness until the end of the first year of employment, Miller-Wohl terminated Ms. Buley's employment.

After her discharge, Ms. Buley filed a complaint against Miller-Wohl with the Commissioner of Labor and Industry alleging a violation of the Montana Maternity Leave Act (MMLA). The Montana Maternity Leave Act provides in pertinent part, that "[i]t shall be unlawful for an employer or his agent to: 1) terminate a woman's employment because of her pregnancy; [or,] 2) refuse to grant the employee a reasonable leave of absence for such pregnancy . . ." Section 49-2-310, 311, MCA (1983).[1] The Commissioner found that the Appellant violated the MMLA, that the MMLA did not conflict with federal law and therefore it was not preempted by Title VII of the Civil Rights Act of 1964. The state district court,

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[1] Based upon an alleged conflict between the MMLA and Title VII, Appellant sought injunctive relief in federal court to prohibit the Commission from continuing its action against Miller-Wohl. The district court's order finding that there was no preemption of state law was vacated because there was no federal subject matter jurisdiction. See *Miller-Wohl Company v. Commission of Labor & Industry, State of Montana,* 515 F. Supp. 1264 (D. Mont. 1981), *action dismissed,* 685 F.2d 1088 (9th Cir. 1982).

however, reversed the decision of the Commissioner on the grounds that

> "the Maternity Leave Act is discriminatory, is a denial of equal protection of the law, is a protective and preferential statute favoring non-disabled pregnant employees to the discrimination of disabled/non-pregnant employees and disabled male employees, and is pre-empted by Titles VII and XI of the Federal Civil Rights Act."

(A. 3c).[2]

The case was appealed to the Montana Supreme Court which held:

* * * *

> 3) "Miller-Wohl's no leave policy created a disparate effect on women who become pregnant, compared to those employees who do not become pregnant. Although facially neutral, its no-leave policy subjected pregnant women to a job termination risk on a basis not faced by men. The no-leave policy therefore was sexually discriminatory in violation of Title VII and the Pregnancy Disability Act.

* * * *

> 5) Miller-Wohl's termination of Tamara directly violated the MMLA. The policy and purpose of the MMLA is to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females. Its objective in that field, equality, is the same as the objective of Title VII. We do not agree that the MMLA violates Title VII because it is gender-based in its operation, in

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[2] "A." references are to the Appendices to the Jurisdictional Statement.

that it protects women without at the same time protecting others equally.

* * * *

8) We find the MMLA valid."

(A. 3b-4b).

THERE ARE SUBSTANTIAL REASONS FOR NOTING PROBABLE JURISDICTION OVER THIS APPEAL

I. STATE STATUTES MANDATING THAT WOMEN DISABLED BY PREGNANCY BE GIVEN BENEFITS TO WHICH OTHER DISABLED EMPLOYEES ARE NOT ENTITLED POTENTIALLY CONFLICT WITH TITLE VII OF THE CIVIL RIGHTS ACT, AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT OF 1978.

A. This Case Has Important Implications Beyond The Particular Parties.

The Court's disposition of this case could have important ramifications beyond the particular Montana statute and employer. At issue is the authority of state governments to require that pregnant employees be granted employment benefits to which neither male nor female employees who are not pregnant but who also suffer from disabilities, are entitled to receive. The instant case involves a state statute that requires an employer to give a leave of absence to employees disabled by pregnancy even though the employer does not grant such leave to employees with other disabilities. Other states, moreover, have also enacted statutes which provide other employment preferences based on pregnancy.[3] Insofar as this Court is called

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[3] See Conn. Gen. Stat. § 46a-60(a)(7); Calif. Gov't Code § 12945(b)(2), which requires pregnancy leave for up to four months, upheld in *California Federal Savings & Loan Association v. Guerra, et al.*, Nos. 84-5843, 5844, slip op. (9th Cir. April 16, 1985).

upon in the instant case to determine whether these pregnancy-related preferences conflict with Title VII, the case raises important questions of federal employment policy and the appropriate relationship between the federal and state governments in regulating this area.

As shown more fully below, the state laws in question go beyond the federal Pregnancy Discrimination Act, in that the federal Act does not require that pregnant employees be treated any differently than other employees with respect to disability benefits or leave policies. It merely mandates that they receive the same treatment as other employees. At the same time, it is clear that Title VII forbids employers to treat other employees, including males, differently because of their sex. *Newport News Shipbuilding and Dry Dock Company v. EEOC*, —— U.S. ——, 103 S. Ct. 2622 (1983), discussed more fully below at p. 9-10. Our concern, therefore, is that employers may face liability to groups of nonpregnant employees who are not entitled to receive the same employment benefits as are mandated for pregnant employees under these state laws. The federal district court and the Montana Supreme Court suggested that this dilemma could be resolved by the employer extending its policies to provide all employees with these same benefits.[4] This, however, is an improper infringe-

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[4] *Miller-Wohl Co. v. Commissioner*, 515 F. Supp. at 1267; (A. 25b-26b). It should be noted that it is extremely questionable whether the courts have the authority to usurp legislative prerogatives and extend to all employees benefits which the legislature has given only to one group. *See e.g., Homemakers, Inc. v. Division of Industrial Welfare*, 509 F.2d 20, 22 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976); and *Burns v.*

ment upon business prerogatives and uses potential federal liability as a lever to force employers to adopt employment benefit policies beyond those even the state legislature has chosen to require. Further guidance by the Court, therefore, is needed at this time.

B. The Pregnancy Discrimination Act And Its Legislative History Strongly Indicate that All Employees Must Be Treated The "Same" According To Their Ability To Work And That Work Status Preferences May Not Be Given To Pregnant Employees.

The Pregnancy Discrimination Act, enacted in October 1978, was a congressional clarification of employment discrimination law with respect to pregnancy and pregnancy-related issues.[5] The Act, which amends Title VII, reads:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the *same* for all employment-related purposes, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work*, and nothing in Section 703(h)

Rohr Corp., 346 F. Supp. 994, 997 (S.D. Cal. 1972). *And see, California Brewers Ass'n. v. Bryant*, 444 U.S. 598 (1980) (Congress left it to employers and not the courts to establish employment conditions).

[5] Specifically, Congress intended to negate the Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Court stated that a disability insurance plan which excluded coverage for pregnancy related disabilities did not violate Title VII because a condition-related distinction was being made, not a gender-related distinction.

> of this title shall be interpreted to *permit* otherwise (emphasis added).

42 U.S.C. § 2000e(k).

In selecting this language, Congress intentionally specified that all employees should be treated the "*same*" on the basis of their ability or inability to work. The meaning of this language is clear. Pregnant women may be treated no differently—neither more beneficially nor more detrimentally—than any other workers who, for reasons other than pregnancy, are similarly situated in terms of their ability or inability to work.[6]

This construction of the Pregnancy Discrimination Act's plain language is supported by its legislative history. As stated by Senator Stafford on the Senate floor, "When an employer treats pregnancy, childbirth, and related conditions the same as he treats any other disabling condition, then he has complied with this bill." 123 Cong. Rec. 29645 (1977).

Although not discussed by the Court below, the legislative history is replete with evidence that Congress intended to permit only equal treatment. On numerous occasions, it was stated that there was nothing in the Act to mandate any additional treatment for women to accommodate their role as child bearers. In the Senate report submitted by Senator Williams, the legislation was explained as follows:

> the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue

---

[6] Whenever a question of statutory construction arises, it is well-settled that the starting point must be the language used by Congress and it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used by Congress. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68-69 (1982), and cases cited therein.

> working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. *The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.*

S. Rep. No. 331, 95th Cong. 1st Sess. 4 (1977)

The House Report also reaffirms that the Congressional intent was to mandate only equal treatment.

> It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it does not require employers to treat pregnant employees in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter . . . . The bill would simply *require that pregnant women be treated the same as other employees on the basis of their ability or inability to work* . . . .
>
> The "same treatment" may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as *the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work* (emphasis added).

H.R. Rep. No. 948, 95th Cong., 2d Sess. 4-5 *reprinted in* 1978 U.S. Code Cong. & Ad. News 4749, 4752-4753.

C. The Court Should Review This Case To Resolve Apparent Conflicts With Prior Decisions Of This Court.

As construed by this Court, the Pregnancy Discrimination Act requires that all employees, male

and female, be treated the same and forbids sex-related benefit differentials. While the question whether a state statute granting preferential treatment to women disabled by pregnancy conflicts with Title VII is a novel question for the Court, this Court has previously recognized that an employment policy of an individual employer which provides special treatment for pregnant employees violates the Pregnancy Discrimination Act. In *Newport News Shipbuilding and Dry Dock Company v. EEOC*, —— U.S. ——, 103 S. Ct. 2622 (1983), the Court squarely addressed and rejected the assertion that it is appropriate under the PDA to accord preferential treatment to women employees disabled by pregnancy. The Court found that the employer had engaged in unlawful sex discrimination against its male employees by excluding pregnancy from the otherwise comprehensive medical benefits provided to employee spouses. Coverage for pregnancy was provided to female employees. In holding that the male employees had been discriminated against on the basis of sex because female employees received preferential treatment, the Court noted:

> Although the 1978 Act makes clear that this language [the general prohibition against sex discrimination at Section 703(a), 42 U.S.C. § 2000e-2(a)] should be construed to prohibit discrimination against a female employee on the basis of her own pregnancy, it did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female—which was already present in the Act. As we explain infra, . . . petitioner's plan discriminates against male employees on the basis of their sex.

103 S. Ct. at 2627, n.11.

The Court concluded:

> By making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of any employee's sex.
>
> * * * *
>
> The pregnancy limitation in this case violates Title VII by discriminating against male employees.

103 S. Ct. at 2631-2632.

The Court's decision unequivocally states that "[m]ale as well as female employees are protected against discrimination." *Id.* at 2630.

Newport News thus clearly interprets the Pregnancy Discrimination Act as prohibiting any distinction whatsoever made on the basis of pregnancy. Furthermore, the Court held that such a distinction is per se discrimination, regardless of whether the distinction creates a benefit or a detriment for women. If a distinction made on the basis of pregnancy provides women with an additional benefit, the distinction will be per se discrimination because it discriminates against men.

In *Arizona Governing Committee v. Norris*, —— U.S. ——, 103 S. Ct. 3429 (1983), this Court further clarified Title VII by holding that the statute prohibits making any distinctions whatsoever based on sex or sex related factors. In holding that it is unlawful for an employer to classify employees on the basis of sex in predicting longevity for purposes of calculating retirement benefits, the Court stated:

> "What we said in Manhart bears repeating: 'Congress has decided that classification based on

> sex, like those based on national origin or race are unlawful.' [Citation omitted]. The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute '[*e*]*ven a true generalization about* [*a*] *class*' *cannot justify class based treatment.* [footnote and citation omitted].

103 S. Ct. at 3498.

These decisions arguably would render employers liable to employees who are denied benefits that are given to pregnant employees.

The Montana legislature failed to grasp the dilemma created by these decisions and the legislative history of the Pregnancy Discrimination Act. It enacted legislation articulating specific accommodations which an employer must make for pregnant women, including granting them a reasonable leave of absence for such pregnancy when they are unable to work, even where such leave is not available to other disabled employees.

The question in this appeal is whether these two approaches can exist side-by-side. Can an employer comply with the state's mandate for preferential treatment for pregnant women while simultaneously complying with federal law which provides that all persons similar in their ability to work cannot be denied benefits for a sex-based reason?[7] A review of

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[7] The Ninth Circuit recently addressed the same question and found that the two approaches could exist side-by-side because Congress, in enacting the PDA, intended to "construct a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise." *California Federal Savings and Loan v. Guerra*, Nos. 84-5843, 84-

the Montana Supreme Court's decision reveals that that Court did not address this language in Title VII nor the relevant legislative history. Rather the Montana Supreme Court concluded that the Appellant violated Title VII; that the policy and the purpose of the MMLA are the same as the policy of Title VII; and that the MMLA was therefore valid.

While both statutes may have been enacted to prevent pregnancy discrimination, this common intent does not bring the state law in accordance with the federal law. The Pregnancy Discrimination Act did more than set out an objective of eliminating pregnancy discrimination; it set out specific guidelines for combatting the discrimination. Therefore, for state law to be in accordance with the Act it must not only have the same intent but also must follow the same guidelines. Consequently, the Montana Supreme Court's finding that the statutes have like objectives is insufficient grounds for upholding the MMLA.

As stated by this Court in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963):

> The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives . . . A holding of federal exclusion of state law is inescapable

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5844, slip op. at 12 (9th Cir. April 16, 1985). The Ninth Circuit's decision, however, is in conflict with the plain language of the Pregnancy Discrimination Act as supported by the legislative history of the Act. Indeed, the Ninth Circuit's opinion does not discuss the legislative history discussed herein.

> and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . .

373 U.S. at 142.

In the instant case, the conflict between the federal and the state law may be irreconcilable. It may be impossible for an employer to grant preferential treatment to women disabled by pregnancy, as mandated by the state law, and avoid Title VII liability unless it gives the same benefits to employees who are disabled for reasons other than pregnancy.[8] Because of the apparent conflicts between Title VII and state statutes which give preferences to pregnant employees which are not given to others who are similar in their inability to work, the questions raised herein over the validity of such statutes should be considered by the Court.

II. THE MONTANA SUPREME COURT'S RELIANCE UPON THE ADVERSE IMPACT THEORY IS CONTRARY TO THE DECISIONS OF THIS COURT AND THE PURPOSES OF THE PREGNANCY DISCRIMINATION ACT.

The Montana Supreme Court's interpretation of Title VII law conflicts with the Title VII decisions of

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[8] There is no doubt that in enacting Title VII, Congress intended Title VII principles to prevail over conflicting state statutory requirements. Section 708 of Title VII speaks directly to this issue, providing that:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, *other than any such law which purports to require or permit the doing of any act which would be unlawful employment practice under this title.*

42 U.S.C. § 2000e-7 (emphasis added).

this Court. The Montana Supreme Court, in considering this case, made the assumption that an employment policy which does not grant any disability leave to employees during their first year of employment has a disparate impact on women. (A. 3b, 20b). Then, without affording the employer an opportunity to rebut the assumed disparate impact by showing that its policy does not have a disparate impact on women or by showing a business necessity for the employment policy, the Montana Supreme Court found the Appellant to be in violation of Title VII. Furthermore, the court used this finding as a basis for holding that the state statute was not in violation of Title VII. This convoluted reasoning should not be affirmed by this Court.

The adverse or disparate impact method of proof under Title VII is used to attack employment selection criteria which are facially neutral yet fall more harshly on a protected class of employees. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). To establish a prima facie case of disparate impact, a plaintiff must show that a facially neutral employment practice produces a significant adverse impact on a protected group of employees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). There must be some statistical or actual data showing that a disparate impact has occurred. As the Fifth Circuit stated in *Johnson v. Uncle Ben's Inc.*, 657 F.2d 750 (5th Cir. 1981), "In making a prima facie case in a disparate impact suit, however, the plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue." 657 F.2d at 753.

In the pregnancy context, the U.S. District Court for the Eastern District of Missouri in *Marafino v.*

St. Louis County Circuit Court, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd on other grounds*, 707 F.2d 1005 (8th Cir. 1983) noted:

> The Court realizes that women are subject to most of the same types of illness and to the necessity for most of the same types of surgery that men are. Women are subject to the additional occasional physical condition of pregnancy and to the resulting event of childbirth. It might be presumed that those two facts together establish that women, more often than men, are in a position to know that they will require leave of absence from work, for physical reasons, at a fairly definite future time. However, the Court cannot simply imagine a disparate impact. *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 414, 11 FEP Cases 1074 (8th Cir. 1975). In the total absence of any evidence that women do in fact request lengthy leaves of absence more frequently than men, the Court cannot conclude that disparate impact has been shown.

537 F. Supp. at 213.[9]

In the present case, the Montana Supreme Court ruled that, "[a]n employer's no-leave policy therefore poses a drastic effect on women employees of childbearing age, an impact no male would ever encounter." [10] The Montana Supreme Court made this find-

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[9] In *Abraham v. Graphic Arts International Union*, 660 F.2d 811 (D.C. Cir. 1981), the District of Columbia Court of Appeals also assumed that a neutral employment policy failing to grant an adequate leave policy had a disparate impact on pregnant women. Amicus curiae asserts, however, that such an assumption is improper.

[10] (A. 19b.)

ing absent any evidence whatsoever of the impact of Miller-Wohl's employment policy. No evidence was introduced showing how many persons lost their jobs as a result of Miller-Wohl's policy of prohibiting medical-related leave during the first year of employment; no evidence was introduced showing how many of the persons who lost their jobs were pregnant women, non-pregnant women, or men; and no evidence was introduced showing whether, at a statistical significance, there was a disparate impact on one sex or the other.

Consequently, the Montana court's finding of disparate impact was based upon assumptions that were unsupported by any probative evidence. The court's assumption of disparate impact was improper absent any evidence to that fact. The Montana Supreme court compounded its error by then finding that the Appellant violated Title VII without affording the Appellant any opportunity to rebut the disparate impact finding or to show a business necessity for implementing the leave policy. Consequently, the Montana Supreme Court's holding should not be summarily affirmed.

As discussed above, moreover, the Pregnancy Disability Act was enacted to assure the equal treatment of pregnancy-related and other disabilities. But Congress made it clear that one type of disability was not to be singled out for special treatment over others as long as individuals were treated the same with respect to their "inability to work." The fact that an evenhanded policy may have different results for groups having varying disabilities is not the type of "adverse impact" for which the Pregnancy Disability Act permits a remedy.

A similar construction was given by the Court to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, in a case rejecting an argument that a state government's reduction of hospital care provided by Medicaid has an impermissible adverse impact on handicapped persons. In *Alexander v. Choate*, —— U.S. ——, 105 S. Ct. 712 (1985), the Court stated:

> Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs. To conclude otherwise would be to find that the Rehabilitation Act requires States to view certain illnesses, i.e., those particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization. . . . Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). The Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed. Ibid.

105 S. Ct. at 722.

Like 504, Title VII was enacted to ensure evenhanded treatment and opportunity for all persons; however, it was not enacted to be a guarantee that all persons would obtain equal results. To conclude otherwise would be to find that Title VII provides employees with a certain disability, pregnancy, more protection than other disabilities, a result clearly contrary to the PDA's legislative history. Accordingly,

the Montana Supreme Court's improper reliance upon the adverse impact method of analysis should be reviewed by this Court.

CONCLUSION

For these reasons, it is respectfully requested that the Court note probable jurisdiction of this appeal and grant further briefing and oral argument to develop the questions presented.

Respectfully submitted,

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April 26, 1985

MOTION FILED
APR 26 1985

No. 84-1545 (3)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

THE MILLER-WOHL COMPANY, INC.,
APPELLANT,

V.

COMMISSIONER OF LABOR AND INDUSTRY,
STATE OF MONTANA, AND TAMARA L. BULEY,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF FOR ACLU, ACLU OF MONTANA, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, LEAGUE OF WOMEN VOTERS OF MONTANA, NOW, NOW LEGAL DEFENSE AND EDUCATION FUND, AND WOMEN'S LEGAL DEFENSE FUND, AND BRIEF AMICI CURIAE CONCERNING JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The American Civil Liberities Union (ACLU) and its Montana affiliate, the League of Women Voters of the United States and its Montana affiliate, the National Organization for Women (NOW), the NOW Legal Defense and Education Fund, and the Women's Legal Defense Fund move this Court for leave to

file the attached amici curiae brief pursuant to Supreme Court Rule 36. Appellees have not granted consent for Amici to file this brief.

Amici are all organizations involved with both the passage and enforcement of the Pregnancy Discrimination Act of 1978, and collectively have considerable expertise on the issue of pregnancy-based discrimination as it affects the rights of women workers. They are concerned that the decision below poses enormous harm to enforcement of the PDA, thus undermining the rights of women. They are also concerned that the parties to this action have not addressed a core provision of the PDA--that provision (Section 3) requiring that no person may come into compliance with the PDA by reducing any employee's benefits. Unless the views of the Amici are heard by this Court, it could rule on this case without considering this important remedial

provision of the PDA, and thereby seriously undermine the Act.

For the foregoing reasons, Amici respectfully request leave to file the attached brief urging that this Court grant plenary review of the decision below and note probable jurisdiction of this appeal.

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INTEREST OF AMICI CURIAE

This brief amici curiae is submitted on behalf of the American Civil Liberties Union; American Civil Liberties Union of Montana; National Organization for Women; NOW Legal Defense and Education Fund; League of Women Voters of the United States; League of Women Voters of Montana; and Women's Legal Defense Fund.[1] Most of these organizations were leaders in the successful effort to amend Title VII of the 1964 Civil Rights Act through the Pregnancy Discrimination Act of 1978 (the PDA), and all of these organizations have represented women with claims of pregnancy-based discrimination. Amici believe that the decision below has the potential for causing great harm to enforcement of the PDA and urge this Court to grant plenary review in

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1 Statements describing each organization appear in the Appendix to this Brief.

order to receive full briefing and argument on the important issues in this case, especially on the PDA's requirement that persons comply with the PDA by extending benefits to the formerly excluded class of employees.

I. THE QUESTION IS SUBSTANTIAL

This case concerns an attempt by the State of Montana to guarantee certain minimum job protections to women workers facing loss of their jobs because of pregnancy. Amici fully support this goal, but believe this Court must take this case for plenary review to assure that this goal is achieved in a way that complies with the Pregnancy Discrimination Act of 1978 (the PDA),[2] amending Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq. The

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2 Pub. L. No. 95-555, 92 Stat. 2076 (1978), 42 U.S.C. § 2000e(k).

PDA prohibits states and employers from classifying on the basis of pregnancy; it also prohibits states and employers from reducing any employee benefits as a way of coming into compliance with the Act. The legally appropriate way for Montana to achieve its goal is therefore to extend to all workers the job protections it grants to pregnant employees. This is the only way to achieve job protection for pregnant workers which does not risk severely undermining the PDA--a statute of enormous importance in eradicating deeply ingrained discrimination against pregnant workers.

The Montana statute at issue in this case[3] is drafted not as an anti-discrimination measure, but as an affirmative grant of special rights to pregnant, female workers. Women workers

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3 Montana Maternity Leave Act, MONT. CODE ANN. § 49-2-310, 311 (1983).

alone are provided with the fringe benefits of an unpaid leave of absence and protection against termination of employment when they are disabled from working due to pregnancy, childbirth, or related medical conditions. The statute does not extend the same fringe benefit rights to workers equally disabled from working due to other medical conditions, for one explicit reason: such disabilities are not tied to pregnancy, childbirth, or related medical conditions.

Thus, on its face, the Montana statute directly conflicts with Title VII's ban on sex-based discrimination, which the PDA defined as including all discrimination based on "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (1982). The PDA further specified the relevant standard to be used in measuring whether such discrimination has occurred:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purpose,

> including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.... Id. [Emphasis added.]

The Montana statute plainly violates this mandate by treating workers disabled for non-pregnancy-related reasons worse than workers similarly disabled, but for pregnancy-related reasons.

Yet the decision of the Montana Supreme Court, Miller-Wohl Company v. Commissioner of Labor and Industry, 692 P.2d 1243 (Mont. 1984), ignores this patent conflict between the two statutes. The Court ruled instead that no conflict existed because "[t]he policy and purpose of the MMLA is to protect equal job opportunities for women as compared to others by removing a female disability job risk not faced by men and non-pregnant females," id. at 1245-46 [emphasis added], and Title VII has the same purpose.[4] The Court thus assumed that women and men face an equal number of days lost

from work for disabilities which both sexes can incur, but that women face an additional risk due to pregnancy,[5] that must be removed to ensure equality. But this very assumption that pregnancy is sui generis, was the basis for this Court's now-overruled opinion in General Electric Co. v. Gilbert,

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4 692 P.2d at 1245. Similarly, the Court noted that "[a]lthough facially neutral, [Miller-Wohl's] no-leave policy subjected pregnant women to job termination risk on a basis not faced by men and...therefore was sexually discriminatory in violation of Title VII and the Pregnancy Disability [sic] Act." Id. at 1245. [Emphasis added.]

5 This factual premise was unsupported by any evidence. Indeed, available data suggest that days lost from work are approximately the same for both sexes even including pregnancy-related disability. NATIONAL CENTER FOR HEALTH STATISTICS, DISABILITY DAYS, UNITED STATES (1980); DEPARTMENT OF HEALTH AND HUMAN SERVICES, VITAL AND HEALTH STATISTICS 6, Series 10-No. 143, Pub. No. (PHS) 83-1571 (1983). This makes sense when one recalls that males have a shorter average longevity than females, see Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702, 704 (1978), which presumably derives from a greater male risk of disability from such causes as heart attacks and smoking.

429 U.S. 125 (1976),6 and was an assumption that Congress decisively rejected in enacting the PDA: "[t]he bill rejects the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability to other conditions."7 The PDA is thus premised on the comparability of pregnancy-related disability with other disabilities for

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6 See W. Williams, Equalities Riddle: Pregnancy & the Equal Treatment/Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE ___ (1984-85)[hereinafter cited as Williams] (forthcoming in May 1985; manuscript currently available from New York University Review of Law & Socal Change), for an insightful analysis of this reasoning. Professor Williams contends that the Gilbert holding that pregnancy is an "additional risk, unique to women," Gilbert, 429 U.S. at 139, means that the Court viewed pregnancy "...as an 'extra,' an add-on to the basic male model for humanity." Id.

7 See S. REP. NO. 331, 95th Cong., 1st Sess. 4 (1977), reprinted in SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT OF 1978, 41 (Comm. Print 1979) [hereinafter cited as LEGISLATIVE HISTORY].

employment purposes, as this Court subsequently recognized in Newport News Shipbuilding & Dry Dock Company v. EEOC, 462 U.S. 669, 103 S. Ct. 2622 (1983). Accordingly, the Montana Court's contrary view must be overturned.

Because the Montana Supreme Court found no conflict between the MMLA and Title VII, it of course had no jurisdiction to order extension of the special pregnancy-based fringe benefits to other disabled workers. But in an apparently tacit admission that this Court might find such a conflict, ("extension of such MMLA benefits to all workers would end any argument that the MMLA is indeed sex based discrimination in violation of Title VII," 692 P.2d at 1255), it considered extension as a remedy. Id. at 1254-55. Specifically, the court found that it had the power "to save the legality of questioned legislative enactments by the doctrine of extension, extending the same

benefits to those who would otherwise be discriminated against," and that "[t]his case presents a proper one for judicial extension." Id. at 1244. Moreover, the court noted that strong state policy reasons favored extension. With no state-federal conflict theoretically in sight, however, the proposed extension could only be deferred to the legislature. Although the Montana court failed to order extension because of its erroneous view that there was no conflict between the PDA and the MMLA, its back-up ruling on extension correctly anticipated a second PDA provision--that provision requiring persons not in compliance with the PDA on its date of enactment to come into compliance by raising the benefits of the discriminated-against class, rather than eliminating benefits for the favored class. Section 3 of the Pregnancy Discrimination Act.

As we show in detail below, if allowed

to stand uncorrected, the Montana Supreme Court decision poses enormous risks to the requirements and policies of the PDA.[8] By resurrecting the Gilbert rationale, it opens the door to a renewal of the formerly pervasive and widespread discrimination against pregnant workers, based on the view that pregnancy sets women apart. If a pregnancy-based classification is not sex-based for Title VII purposes, then states may once again enact state laws explicitly harming pregnant workers, and private employers may take action to the same effect. Moreover, the no-conflict ruling also led the Montana court to fail to implement a second important policy requirement of the PDA--that compliance with

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8 See also the recent decision of the Ninth Circuit in California Federal Savings and Loan Ass'n v. Guerra, Nos. 84-5843, 84-5844 slip ops. (9th Cir., April 16, 1985) similarly refusing to recognize the patent conflict between California's special leave for pregnant workers and the PDA.

the PDA requires upward adjustment of benefits so that all workers are covered at the higher level.

The decision also merits plenary review because it specifically permits discrimination against the non-pregnant, in flagrant disregard for the teachings of this Court in Newport News. Finally, this Court's guidance to the states in legislating concerning pregnancy-related matters in employment is sorely needed. The majority of states have adopted neutral anti-discrimination measures or have brought pregnant workers on equal terms into affirmative measures to protect all disabled workers as the best way to resolve these problems. However, at least three states in addition to Montana have opted for statutes granting special rights to pregnant

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9 Compare ALASKA STAT. § 18.80.220 (1981)(unlawful to discriminate on basis of pregnancy); HAWAII REV. STAT. § 378-1 (Supp.

(Footnote continued)

workers.[9] If these latter states are not stopped from legislating on the basis of pregnancy, the encouraging trend to equal treatment of all workers without regard to pregnancy may be ended, despite the explicit command of the PDA.

II. THE RESURRECTION OF THE GILBERT REATIONALE THAT PREGNANCY IS A UNIQUE CONDITION IN ORDER TO PRESERVE SPECIAL PREGNANCY-BASED STATUTES UNDER TITLE VII WOULD SERIOUSLY UNDERMINE THE CONGRESSIONAL PURPOSE OF ELIMINATING DISCRIMINATION BASED ON PREGNANCY.

9(continued)
1984)(same); ME. REV. STAT. ANN. tit. 5, § 45/2-A (Supp. 1984-85); MD. ANN. CODE Art. 49B § 17 (Supp. 1984)(pregnancy related disabilities are temporary disabilities for all job-related purposes); MINN. STAT. ANN. § 363.01 (West. Supp. 1985)(definition of "sex" in discrimination statute includes pregnancy-related conditions); with CAL. GOV'T. CODE § 12,945 (West 1980) right to four months unpaid maternity leave); CONN. GEN. STAT. ANN. § 46a-60 (West Supp. 1984) (right to reasonable maternity leave); MASS. GEN. LAWS ANN. §§ 149.105 D, 151 B.4 (West 1982)(employer shall give employee who has completed probationary term eight weeks maternity leave; unlawful discrimination to fail to comply with requirement).

The view of pregnancy as a unique condition justifying unique treatment by employers caused widespread and serious harm to women workers, and was the evil Congress sought to overturn in enacting the PDA. If that view is resurrected through a summary affirmance of the Montana Supreme Court decision in this case, the PDA will be effectively nullified.

Congress passed the PDA because it was aware of the pattern of discrimination faced by pregnant women workers. Professor Williams describes the pervasively harmful pregnancy-based employer policies prior to the PDA:

> By 1960, the dawn of the decade that would usner in Title VII, many employers simply fired women who became pregnant. Others provided unpaid maternity leaves of absence, frequently accompanied by loss of seniority and accrued benefits. Few provided job security, much less allowed paid sick leave and vacation time to be used for maternity leave. Payment of disability benefits for childbirth were at best restricted and employer sponsored

> medical insurance provided, at most, limited coverage of pregnancy-related medical treatment and hospitalization.
>
> Pervasively, pregnancy was treated less favorably than other physical conditions that affected workplace performance. The pattern of rules telegraphed the underlying assumption: a women's pregnancy signaled her disengagement from the workplace. Implicit was not only a factual but a normative judgment: When wage-earning women become pregnant, they did and should go home. Williams, supra note 6, at ___.

Legislating on the basis of pregnancy--as Montana has done--might appear superficially to be beneficial to women, but in fact it has many harmful effects. First, laws granting pregnant workers special rights create an incentive to discriminate because they impose upon the employer extra costs and obligations to pregnant employees. At least some employers respond to such incentives by not hiring women.[10] Thus, the

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10 A 1967 survey of seventy-eight companies showed that state protective legislation was the cited explanation in 18% of the instances in which women were rejected for

(Footnote continued)

law intended to expand women's opportunities actually limits them. Even if an employer does not discriminate in hiring and grants special rights to pregnant women, the pregnant worker can become the focus of employee discontent if there is no concomitant policy for other workers. See Miller-Wohl, 692 P.2d at 1255.

A second danger is that the preferential treatment law itself will directly cause the very type of discrimination against pregnant women that the PDA was designed to eliminate. Historically, laws regulating pregnant women workers have limited rather than expanded women's rights. For example, as late as 1970, six states and the territory of Puerto Rico banned the employment of pregnant and post-partum women in a number of industries,

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10(continued)
employment. BUREAU OF NATIONAL AFFAIRS SURVEY, BNA FEP MANUAL, NO. 80 (April 1967).

including manufacturing, food processing, and office work. Koontz, Childbirth and Child Rearing Leave: Job Related Benefits, 17 N.Y.L. FORUM 480, 482-84 (1971). As the EEOC has ruled, laws which

> prohibit or limit the employment of females...for certain periods of time before and after childbirth ...do not take into account the capacities, perferences, and abilities of individual females and, therefore, discriminate on the basis of sex. EEOC Guidelines, 29 C.F.R. § 1604.2(b)(1).

Similarly, of the five states then providing workers with paid temporary disability benefits, only Hawaii did not deny or specially limit benefits for pregnant women.11

In the wake of the PDA, such distinctions largely disappeared as pregnant workers were extended the same benefits

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11 Compare HAWAII REV. STAT. § 392-21 (1976) with CAL. UNEMP. INS. CODE § 2626 (Deering 1971); N.J. STAT. ANN. § 43:21-29 (West 1962); N.Y. WORK. COMP. LAW § 205 (McKinney 1965); R.I. GEN. LAWS § 28-41-8 (1979).

provided other workers and were allowed to work on the same terms as other workers facing impending disability. See e.g., N.J. STAT. ANN. § 43:21-29 (West Supp. 1984). But such laws can easily reappear if the decision below is affirmed. For the assumption that pregnant workers need special treatment inevitably leads to a framework in which special pregnancy provisions explicitly harming pregnant workers are seen as equally justifiable. As an example, California--one of the states providing for a special leave of absence for pregnant workers--has several statutory provisions explicitly harming pregnant women. One of these allows employers of five or more persons to refuse to hire or employ pregnant women because of their pregnancy, CAL. GOV'T. CODE § 12,945.12

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12 This provision should be compared to CAL. GOV'T. CODE § 12,943, which prohibits school districts, but not other employers, from
(Footnote continued)

Like California, Montana's statute has a provision which may prove disadvantageous to pregnant workers: an employer may force an employee to take a "reasonable" maternity leave.[13] Given the history of forced leave

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12(continued)
refusing to hire or employ because of pregnancy. Another provision first prohibits employers from refusing to select a pregnant employee for a training program because of her pregnancy, and then allows employers to do so if the employee will not finish the training program at least three months prior to having her baby, whether or not other employees with upcoming disabilities are similarly barred from training programs. CAL. GOV'T. CODE § 12,945(a). Yet another provision allows an employer to provide only six weeks paid leave for normal pregnancy, even if that employer provides longer paid disability leave for all other conditions. CAL. GOV'T. CODE § 12,945(b)(1). In the same vein, all employers are specifically exempted from providing health insurance benefits for pregnancy-related conditions, even if such employers provide benefits for all other medical conditions. Id.

13 MONT. CODE ANN. § 49-2-310(4) provides that it is unlawful for an employer to "require that an employee take a mandatory maternity leave for an unreasonable length of time." Presumably, an employer can require leave for a "reasonable" length of time.

considered reasonable by employers, see, e.g. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1973), this provision has dangerous implications. Yet viewing pregnancy as unique rather than comparable to other medical conditions that may affect workers inevitably has this double-edged effect.

The third danger posed by such laws to the Congressional policy of the comparability of pregnancy and non-pregnancy related disability is that they perpetuate the belief that pregnancy is "a unique burden" of women employees, and that pregnant workers are more expensive, less reliable, more often disabled, and therefore less desirable employees than other workers. If a state may reasonably cite such a burden as the basis for a law, why may not an employer reasonably consider such a burden in selecting its employees?

The final way in which special

preference laws are harmful is that they discourage the rooting out and elimination of discrimination. This is amply illustrated by the case at hand. The Human Rights Division investigator charged with examining state antidiscrimination claims recommended that Ms. Buley pursue an MMLA claim rather than a discrimination claim. Buley v. Three Sisters, Montana Human Rights Commission, SE80-1255, Appendix to Complaint, Miller-Wohl Company v. Commissioner of Labor and Industry, 515 F. Supp. 1264 (D. Mont. 1981). Because the MMLA is not an anti-discrimination measure, the MMLA investigator did not consider any of the evidence suggesting that Miller-Wohl might have acted discriminatorily. For example, although much of Miller-Wohl's Employees Guide[14] contains language

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14 THE MILLER-WOHL COMPANY EMPLOYEES GUIDE, Appendix to Appellant's Brief at 57-71, Miller-Wohl, 692 P.2d 1243 [hereinafter

(Footnote continued)

suggesting prima facie violations of the PDA, none of it was analyzed as evidence of discrimination.[15] Thus, the mere existence

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14(continued)
cited as GUIDE].

15 For example, the booklet has separate sections for Sick Leave, Leaves of Absence for Protracted Illness, and Maternity; the Sick and Illness Sections provide for five days of paid sick leave and up to six months of unpaid leave for workers with one year of seniority, while the Maternity Section makes no reference to paid leave or to six months protracted leave, suggesting that neither the paid leave nor the automatic entitlement to up to six months of unpaid leave was available to women disabled from working for pregnancy-related reasons. GUIDE, supra note 14, at 63-64.

Similarly, a separate Guide section on Time Off (not limited to employees with one year of seniority) includes the right to have "time off" for illness, and Ms. Buley received two and a half days of unpaid leave within her first week of employment, Miller-Wohl, 692 P.2d at 1245, when both she and her employer thought she had the flu. Not until Miller-Wohl had notice of her pregnancy was she fired. See 29 C.F.R. § 1604.10(a)(policy of excluding employees from employment because of pregnancy prima facie violation of Title VII). Yet no evidence was ever collected comparing days of leave granted for employees of under one year, by sex and by reason of disability, either for this Miller-Wohl store, or for

(Footnote continued)

of a statute granting special rights to pregnant women deflects attention from the issue of whether pregnant women are in fact receiving worse treatment than other workers,[16] and suggests to employers and

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15(continued)
its 289 other stores--evidence needed for a disparate treatment theory of discrimination.

16 Neither the disparate treatment Title VII theory, see supra note 15, nor the alternative, disparate impact theory was ever explored in this case. See EEOC Guidelines on Pregnancy, 29 C.F.R. § 1604.10(c): "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity." [Emphasis added.] This argument is not to be confused with an assumption of disparate impact arising from the mere fact of pregnancy, a theory used by the Montana Court. See supra note 5 and accompanying text. Rather, impact must be proved by examining the actual statistics at Miller-Wohl's stores. If impact could merely be assumed, as many groups have argued in attempting to save the MMLA as a justified one-sex law needed to rectify automatic disparate impact, there would be no need for the conditional language of 29 C.F.R. § 1604.10(c), since any no-leave

(Footnote continued)

other workers that such women are instead getting better treatment, thereby engendering possible incentives to discriminate to an even greater degree against women who might become pregnant, and giving co-workers cause for resentment at the "special deal" women are theoretically getting.

III. MILLER-WOHL HAS NO FEDERAL DEFENSE TO ITS VIOLATION OF STATE LAW BECAUSE ALTHOUGH THE MMLA ON ITS FACE CONFLICTS WITH THE PDA, THE PDA EXPLICTLY REQUIRES THE EXTENSION OF BENEFITS TO THE FORMERLY EXCLUDED CLASS RATHER THAN THE REMOVAL OF BENEFITS FROM THE FAVORED CLASS, AND MILLER-WOHL HAS VIOLATED THE STATE STATUTE AS SO EXTENDED.

There is no dispute in this case that Miller-Wohl violated the express terms of the MMLA. Instead, Miller-Wohl asserts, as an affirmative defense, that the MMLA

16(continued)
policy would automatically be invalid.

violates Title VII by providing for leave to only one class--pregnant workers--in violation of Title VII, and so must be invalidated. If the MMLA is invalid, Miller-Wohl need not comply with it.

This argument, however, flatly ignores Section 3 of the PDA, which provides that persons may not come into compliance with the PDA by reducing benefits to the favored class--in this case, pregnant employees. The result Miller-Wohl urges here would accomplish precisely what Section 3 forbids: it would allow Miller-Wohl to have come into compliance with the PDA by reducing benefits to the favored class--in this case, pregnant employees. Since this reduction itself would violate the PDA, Miller-Wohl has no defense to its MMLA violation and Ms. Buley is entitled to her back pay and penalty. We show here, first, that the MMLA does conflict with the PDA, and second, that both Miller-Wohl and the State of Montana were

required to come into compliance with the PDA by extending unpaid disability leave to all workers not yet receiving it. Thus, Miller-Wohl has no federal defense to its violation of the MMLA as so extended.

A. The Montana Maternity Leave Act Conflicts With Title VII, As Amended By The Pregnancy Discrimination Act.

The plain language and legislative history of the PDA, and this Court's holding in Newport News, compel the conclusion that the Montana Maternity Leave Act as written conflicts with Title VII. The MMLA provides in pertinent part:

> It shall be unlawful for an employer or his agent to:
>
> 1) terminate a woman's employment because of her pregnancy;
>
> 2) refuse to grant to the employee a reasonable leave of absence for such pregnancy.....17

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17 MONT. CODE ANN. § 49-2-310(1)-(2).

These provisions conflict with both clauses of the PDA:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy...shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work....

Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k)(1982) (Emphasis added). First, the MMLA's protection against termination from employment and its requirement of an unpaid leave of absence are provided only to pregnant women because of their pregnancy; therefore, under the first clause of the PDA, these fringe benefits are denied to the non-pregnant "because of [their]...sex," in violation of section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1982). Second, the MMLA's requirement that employers provide unpaid disability leave only for pregnant

employees violates the second clause's mandate of equal treatment for all employees "similar in their...inability to work." 42 U.S.C. § 2000e(k). The MMLA thus violates the PDA by placing nonpregnant employees in an inferior position to pregnant workers, on the basis of their sex.18

This interpretation is supported by the EEOC guidelines, which require equal treatment even in the relatively rare situation where--as here--pregnant workers receive superior treatment to that of other workers. Thus, the EEOC requires that if pregnancy-related benefits are provided to

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18 Cf. Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. Pt. 1604 App., Question 5 (employer required to treat disabled pregnant employees in same manner as others, e.g., by providing leaves without pay if others receive them); Question 19 (for purposes of disability insurance, employers must extend to employees temporarily disabled by pregnancy same paid disability benefits received by employees affected by other temporary disabilities, even if state law allows smaller benefits for pregnant workers).

pregnant women after their employment has ended (Question 29, 29 C.F.R. Pt. 1604 App.), or if pregnant employees, unlike other employees, do not have to prove total disability as a prerequisite for payment of extended benefits (Question 30, 29 C.F.R. Pt. 1604 App.), such superior benefits have to be extended to other workers.

The legislative history of the PDA also demonstates that Congress intended to guarantee equality of benefits, not a minimum or special benefit for pregnant workers. The PDA's sponsors repeatedly stated that equality was the purpose of amending Title VII. See, e.g., statement of Senator Williams ("[t]he key to compliance in every case (would) be equality of treatment)."[19] (Emphasis added.) Senator Brooke specifically rejected the notion that

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19 123 CONG. REC. 29,385 (1977), reprinted in LEGISLATIVE HISTORY, supra note 7, at 62.

the PDA would affirmatively grant pregnant workers entitlement to special benefits:

> S. 995 in no way provides special disability benefits for working women. They have not demanded, nor asked, for such benefits. They have asked only to be...accorded the same employment rights as men.20

Thus, as the legislative history abundantly shows, the legislators intended for the PDA to ensure that pregnant workers were treated equally with other workers. Nowhere in the legislative history is there evidence of an intent to give preferential treatment to pregnant workers, as does the MMLA.

Moreover, some groups opposed the PDA precisely because it gave pregnant workers equal and not superior rights. For example,

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20 Id. at 29,664, reprinted in LEGISLATIVE HISTORY, supra note 7, at 135. Accord, remarks of Senator Culver, id. at 29,663, reprinted in LEGISLATIVE HISTORY, supra note 7, at 133. See also id., reprinted in LEGISLATIVE HISTORY, supra note 7, at 133 (remarks of Sen. Mathias)(bill does not require employers to do more for pregnant workers than for any other employees).

the American Retail Federation testified before the Senate Subcommittee on Human Resources that by prohibiting distinctions based on childbirth and pregnancy, "the bill could be read as prohibiting employment practices which provide pregnant women or new mothers with benefits not available to other employees."[21] Similarly, the National Association of Manufacturers unsuccessfully urged Congress to amend the PDA so as to require all employers to provide special disability coverage to pregnant workers--the precise result required by the MMLA--instead of only requiring employers with existing plans to upgrade their coverage to include pregnant workers.[22] Yet Congress passed the

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21 Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 490 (1977)(statement of the American Retail Federation).

22 Id. at 86-87 (statement of Francis Coleman from National Association of

(Footnote continued)

PDA without amendments to respond to these criticisms.

Finally, in Newport News this Court recognized that classifications based on pregnancy are equivalent to sex-based discrimination and that Congress has "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision." Newport News, 103 S. Ct. at 2628. The Court also rejected the employer argument in Newport News that male workers could not possibly be protected against sex-based discrimination (arising from the less comprehensive health insurance benefits provided their spouses than the spouses of female workers) because congressional debate had focussed on women workers, not the spouses of male workers.

> This does not create a "negative inference" limiting the scope of the Act to the specific problem that

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22(continued)
Manufacturers).

> motivated its enactment.... Proponents of the legislation stressed throughout the debates that Congress had always intended to protect all individuals from sex discrimination in employment--including but not limited to pregnant women workers.

Id. at 2629-30 (emphasis in original) (citations and footnote omitted). Newport News thus makes clear that any discrimination based on pregnancy is illegal sex-based discrimination, whether directed against pregnant employees (the "normal" situation that Congress primarily focused on), or against the non-pregnant employee (the situation here). The Montana Court's rejection of that simple command, and its tortured attempt to avoid the plain conflict between the MMLA and the PDA through resurrection of the Gilbert pregnancy-is-sui generis rationale, must therefore be overturned.

B. The Pregnancy Discrimination Act Itself Required: (1) Montana To Extend The MMLA In April 1979 To Provide Leave For All Employees And (2) Miller-Wohl To

Come Into Compliance With The PDA By Providing This Leave To Those Few Employees Who Did Not Already Have It.

Section 3 of the PDA expressly provides that:

> Until the expiration of a period of one year from the date of enactment of this Act...no person who, on the date of enactment of this Act is providing either by direct payment or by making contributions to a fringe benefit fund or insurance program, benefits in violation with this Act shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program.... [Emphasis added.]

Pub. L. No. 95-555, § 3, 92 Stat. 2076, 2077 (1978). See also EEOC Guidelines, 29 C.F.R. § 1604.10(d)(1). Montana is a "person" covered by this provision,[23] and must come into compliance with the PDA by extending benefits to the formerly excluded class,

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23 See Section 701(a) of Title VII, 42 U.S.C. § 2000e(a) (the term "person" includes governments).

thus granting to all workers the unpaid disability leave it guarantees to pregnant women.[24] The principle does not change because here it is the pregnant, rather than the non-pregnant, who receive superior treatment. See Newport News, 103 S. Ct. 2622.

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24 Indeed, the United States Attorney General has successfully sued the State of Rhode Island for a similar failure to come into compliance with the PDA. Barone and the United States v. Hackett, 35 EPD para. 34,838 (D.R.I. 1984). Barone involved Rhode Island's statutory temporary disability plan, which gave pregnant workers lower paid benefits than all other workers. The case was brought because Rhode Island had failed to extend the higher benefits to pregnant women until more than two years after enactment of the PDA. Rhode Island was sued as a person in that action under the Attorney General's Section 707 pattern and practice authority ("Whenever the Attorney General has reasonable cause to believe that any person...is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern and practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action...."), 42 U.S.C. § 2000e-6(a), and Montana could be subject to suit under the same authority. [Emphasis added.]

Under Section 2 of the PDA, Montana's obligation to extend the MMLA arose on April 29, 1979, since the effective date for fringe benefit programs was set at 180 days after the enactment of the Act on October 31, 1978. Furthermore, Montana was required to continue benefits at the higher sex-neutral level until October 1, 1979, one year after the PDA's date of enactment. Since the cause of action in this case arose in August 1979, Miller-Wohl, 692 P.2d at 1245, the Montana Supreme Court should have ruled that, by operation of the PDA, the MMLA had been extended to cover all employees and that Ms. Buley's MMLA cause of action was valid as brought under the extended statute. Thus, Miller-Wohl is liable for its violation of state law, since the PDA requires extension not invalidation of the Montana statute.

In effect, Miller-Wohl is using its invalidation argument as a way of allowing

it to have complied with the PDA by reducing the benefits provided to its workers--i.e., by eliminating the special leave for women workers. Prior to enactment of the PDA, Miller-Wohl had no federally-based objection to compliance with the MMLA since under this Court's decision in Gilbert, the MMLA did not violate Title VII. Miller-Wohl was thus validly required to provide the MMLA benefits to pregnant workers "on the date of enactment" of the PDA. See Section 3, quoted supra. Given that fact, the company was required to come into compliance with the PDA by extending the leave it was required to provide to pregnant workers to all other temporarily disabled workers; and since the company already had a generous disability leave policy for most workers (those with one year's seniority), it effectively would have come into compliance by extending this pre-existing policy to that small group of employees (those with

less than one year of seniority) who did not already receive it. See 29 C.F.R. Pt. 1604 App. (Question 32).

The Congressional intent behind Section 3 of the PDA was to provide a transitional period during which employers would be required to provide men and women the same higher level of benefits; this in turn would enable employers to assess the actual impact of the legislation.[25] Congress expected that experience with the expanded programs would convince employers that the addition of pregnancy as a covered disability would not disrupt their benefit programs to such an extent that reduction in benefits after the experimental period would be

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25 See remarks of Senator Williams ("these time periods [would] provide all affected parties with an opportunity to gain experience with the actual impact of the legislation."), 123 CONG. REC. 29,386 (1977), reprinted in LEGISLATIVE HISTORY, supra note 7, at 63.

26 "These periods were prescribed on the
(Footnote continued)

necessary.[26] Congress' strong policy favoring raising benefits to the level received by the previously benefitted class is further revealed in the Senate Report, which cautioned that the time limits in Section 3 should not be construed as "permission for employers who do not comply immediately to reduce benefits once the time limits have run."[27]

Thus, Montana failed to extend the MMLA and bring it into compliance with the PDA's mandate of equality without reduction of benefits. As a matter of law, the MMLA should have been extended, and as extended,

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26(continued)
assumption that, after employers have come into compliance and been in compliance for some time, it is very unlikely that changes in fringe benefit packages would be made because of the need to provide equal benefits for pregnant women." Id. at 29,386, reprinted in LEGISLATIVE HISTORY, supra note 7, at 63.

27 S. REP. NO. 331, 95th Cong., 1st Sess. 8 (1978).

would provide the basis for Miller-Wohl's state law liability. Similarly, Miller-Wohl was under a separate obligation to come into compliance with the PDA by extending benefits to the non-pregnant, whether or not Montana had formally acted to extend the statute.

Finally, while extension of benefits was mandated by Congress in passing the PDA, extension also accords with both Montana law and the state legislature's intent in passing the MMLA. First, the Montana Supreme Court found that extension was an appropriate remedy within its judicial power, relying especially on Welsh v. United States, 398 U.S. 333 (1970) (Justice Harlan's concurring opinion), and Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972). See Miller-Wohl, 692 P.2d at 1254. The court noted approvingly that extension would foster the state's general interests in "promoting the health and

welfare of all its citizens," furthering sexual equality, and eliminating hostility toward pregnant workers from those denied disability leave. The court also concluded that a sex neutral disability leave policy would cause the employer no financial disruption and little administrative expense. Id. at 1255.

Indeed, extension would affect only a relatively small number of non-pregnant employees, since the vast majority of employers do not fire workers for medical disability. Even Miller-Wohl gives most of its own employees (all with at least one year of seniority) six months of unpaid leave for illness. Miller-Wohl, 692 P.2d at 1249. Furthermore, recent statistics indicate that the overwhelming number of employees already receive paid sick leave benefits.[28]

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28 Ninety-three percent (93%) of the firms
(Footnote continued)

In addition to the Montana court's ruling on extension, the available MMLA legislative history supports extension. The MMLA was drafted by the Montana Legislature's Subcommittee on the Judiciary as part of a package assembled in response to a legislative mandate to study and then eliminate discrimination from Montana's

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28(continued)
in a BNA survey provided paid sick leave to office and clerical workers, 91% provided paid sick leave to management workers, and 69% provided paid sick leave to plant/service workers. THE BUREAU OF NATIONAL AFFAIRS, PERSONNEL POLICY FORUM, POLICIES ON LEAVE FROM WORK, Table 1 (June 1983). [Although fewer plant and service workers received paid sick leave benefits, they are more likely to be covered by short-term disability insurance benefits. BUREAU OF LABOR STATISTICS, EMPLOYMENT BENEFITS IN LARGE AND MEDIUM FIRMS 4 BULLETIN 2213 (1983).] Finally, eighty-one percent (81%) of the companies provided this paid leave during the first year of employment. THE BUREAU OF NATIONAL AFFAIRS, PERSONNEL POLICY FORUM, supra at Table 6. Nine out of ten employers had additional unpaid leave programs for all three employee groups, allowing employees to take leave for extended physical disability and other needs. Id. at Table 33.

laws. INTERIM STUDY BY THE SUBCOMMITTEE ON JUDICIARY, "EQUALITY OF THE SEXES" 1 (Dec. 1974). At that time, women were being discriminated against either because of mandatory maternity leave policies or because some employers fired women who became pregnant in lieu of granting them disability leave. Since Geduldig v. Aiello, 417 U.S. 484 (1974), allowed the state to classify on the basis of pregnancy, and since the subcommittee assumed that only women were being denied disability leave, it chose to frame the statute as a guarantee to one sex of what it believed the other sex already had.

The emphasis in committee meetings was on the need for a statute to ensure that pregnancy disability be treated like any other disability. Mr. Barrett, of the Employment Security Division of the Montana Department of Labor and Industry, stressed both the similarity between the MMLA and

disability leave in general, and the fact that the statute was needed to assure that women would receive maternity disability leave.[29] The MMLA, therefore, was intended to protect against employers singling out pregnancy disability for less favorable treatment than any other disability. Extending the MMLA, as required by the PDA, will thus preserve this state policy while imposing very little cost on employers both because the leave is unpaid and because it is already available to most employees.[30]

Extension also accords with other sources of Montana law which demonstrate the

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29 Minutes of the Meeting--Montana State Senate, Feb. 5, 1975, at 3.

30 Extension may even help reduce employers' costs, since Montana pays unemployment benefits to workers who lose their jobs after illness, once they are able to return to work. See MONT. CODE ANN. § 39-51-2302(2). Since employers are taxed for these benefits, requiring them to keep such workers on the payroll will reduce these employer taxes.

state's commitment to protecting the job rights of sick and disabled employees. For example, Montana's public employees are given paid sick leave and may also be granted additional leave-without-pay, without distinctions based on pregnancy. MONT. CODE ANN. § 2-18-618 (1983). The Montana Supreme Court has also ruled that employers have a duty of good faith and fair dealing in their employment relationships, and that this duty may include not firing an employee when absence is due to temporary illness. See Dare v. Montana Petroleum Marketing Co., 687 P.2d 1015 (Mont. 1984)(employee fired when she became too ill to perform employment duties as gas station cashier may have cause of action for wrongful discharge). Thus, both the PDA and Montana law and public policy require extension rather than invalidation of the MMLA, as the appropriate resolution of the PDA-MMLA conflict. Miller-Wohl's attempted

federal defense to its state law violation must therefore fail.

Conclusion

For the reasons set forth above, this case presents important and difficult questions of interpretation of both Section 1 and Section 3 of the Pregnancy Discrimination Act of 1978. The Montana Supreme Court decision would have profoundly negative implications for the enforcement of the PDA if summarily affirmed by this Court. This Court should therefore grant note probable jurisdiction of this appeal.

Respectfully submitted,

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** Thanks are extended to Georgetown University Law Center students D. Hollander, L. Isensee, D. Johnson for their help in preparing this brief.

APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The American Civil Liberities Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to help eliminate the pervasive problem of gender-based discrimination. It has participated in the litigation of many cases challenging sexually discriminatory practices, including in particular the major cases involving discrimination against women on the basis of pregnancy. The ACLU of Montana is the Montana affiliate of the ACLU.

The National Organization for Women ("NOW") is a membership organization of approximately 250,000 men and women in about 750 chapters throughout the United States dedicated to assuring equal employment

opportunities for women and bringing women into full participation in American society. NOW is frequently contacted by and asked to assist women who have been subjected to sex discrimination, including discrimination based on pregnancy.

The NOW Legal Defense and Education Fund ("NOW LDEF") was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The League of Women Voters of the United States is a national non-partisan

political membership organization with 110,000 members in more than 1,300 state and local Leagues in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. Since it was founded in 1920, the national League's purpose has been to promote political responsibility through informed and active participation of citizens in government. From its inception, the national League has worked for equal rights. The national League believes that no person or group should suffer legal, economic or administrative discrimination. To further its commitment to equal access to employment, the national League has participated as an amicus in many of the major cases challenging race and sex discrimination in employment. It has worked for passage of federal legislation that would eliminate discrimination, including the Pregnancy Discrimination Act of 1978, and for the adoption of effective

regulations to implement those laws.

The League of Women Voters of Montana is the Montana affiliate of the national League, and has worked at the state level for the adoption of laws and regulations to provide equal access to employment for women in Montana.

The Women's Legal Defense Fund is a non-profit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combatting sex discrimination in employment through litigation of significant employment discrimination cases, through the operation of an employment discrimination counseling program, and through agency advocacy before the EEOC and other federal agencies charged with enforcement of the equal opportunity laws. It has had particular interest in the

implementation of the Pregnancy Discrimination Act, which it worked to pass in 1978 and whose enforcement it has since monitored through its Pregnancy Rights Monitoring Project.